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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

JERRY DUPLER,

Petitioner,

v.

MANSFIELD JOURNAL CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

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QUESTIONS PRESENTED

When a jury answers questions specifically finding actual malice by clear and convincing evidence at the time of publication, does a reversal by a reviewing Court at the pre-trial summary judgment stage violate this Court's decision enumerated in the *Hutchinson v. Proxmire* ruling and the due process clause of the Fourteenth Amendment to the United States Constitution?

Does the decision below conflict with this Court's decision rendered in the *Hutchinson v. Proxmire* case and the due process clause of the Fourteenth Amendment to the United States Constitution?

Is there confusion among the several states and various Federal Courts on the propriety of the use of summary judgments in deciding the issue of actual malice in libel cases requiring a clarification by the United States Supreme Court?

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Brief of Petitioner

The Petitioner, Jerry Dupler, prays that a writ of certiorari issue to review the opinion and judgment of the Supreme Court of Ohio rendered in these proceedings on December 17th, 1980, and the denial of a motion to rehear the case by that Court entered on January 22nd, 1981.

OPINIONS BELOW.

The opinion of the Supreme Court of Ohio is reported and appears in 64 Ohio St. 2d 116 (1980). The opinion is reprinted herein at Appendix A, *infra*, p. A-1,.

The opinion of the Court of Appeals For Tuscarawas County, Ohio, Fifth Appellate District, is unreported and appears at Appendix B, *infra*, p. B-1,. The opinion and judgment entry of the Tuscarawas County Court of Common Pleas relative to respondent's motion for summary judgment is unreported and appears at Appendix C, *infra*, p. C-1.

JURISDICTION

The order or judgment of the Supreme Court of Ohio was entered on December 17th, 1980. See Appendix A. *infra*. A motion for rehearing before that Court was timely filed on December 29th, 1980. See Appendix D. *infra*. This Motion for rehearing was denied on January 22nd, 1981. See Appendix E. *infra*. This petition for certiorari was filed within 90 days from the date aforesaid. The jurisdiction of this court is invoked under 28 U. S. C. 1257 (3).

CONSTITIONAL PROVISIONS INVOLVED.

Constitution of the United States, Amendment XIV:

"...nor shall any state deprive any person of life, liberty, or property without due process of law..."

Ohio Constitution of 1851, Art. I, Sec. 5 (Amended 1912):

"The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury."

STATEMENT OF FACTS

Petitioner, Jerry Dupler filed a Complaint for damages against Respondent, Mansfield Journal Company (publisher of the Times-Reporter Newspaper located in Dover-New Philadelphia, Ohio), on or about March 12, 1976. Petitioner's cause of action arose against Respondent based upon a series of newspaper stories and an article appearing in the Editorial page of the Times-Reporter between the dates of April 4th and 9th, 1975. These articles are reproduced by Petitioner in Appendices H, I, and J, *infra*.

Subsequent to the appearance of the articles by the Respondent, the Petitioner, pursuant to Ohio Revised Code 2739.13 and 2739.14, issued a statutory request for retraction, said statutes are reproduced in Appendix K, *infra*.

The Respondent, being aware of the statutory requirements regarding "publishing corrected statements", failed to comply with said statutes in the following manner:

(1) Additions to the article were made.

(2) The article did not occupy a like space in the newspaper as the original.

(3) The article omitted the phrase "Editorial Retraction" and substituted the phrase "Editorial Rebutted."

(4) It added the Petitioner's name to the article as though it were merely a letter to the Editor.

Petitioner's complaint alleged the Respondent's article of April 9th, 1979 "wilfully and with actual malice and intending to injure and defame the Plaintiff (Petitioner herein) in his character and reputation and to injure his profession and vocation intentionally, published in said newspaper, the Times-Reporter, the editorial accusing Plaintiff of Criminal Conduct."

Petitioner, on the date of the article, was a Dover,

Ohio, City Councilman, an employee of Kline Potato Chip Company, a licensed private investigator, and also a mayoral candidate.

The article which defamed this Petitioner, which was written by Harry Yockey, Editor of the Times-Reporter, appears in Appendix J, *infra*.

Testimony from Mr. Yockey states (R. 96) that he took all his information for the April 9th, 1975 from two prior articles which gave the true facts, this showing he had actual knowledge at the time of writing his story that it was false. Mr. Yockey during the trial of the case further admitted the following:

(a) That said Appellee maintained *a biographical file* on this Appellant. (R. 97).

(b) That the need for a search warrant as appeared at paragraph No. 4 of the April 9, 1975, Article was a *false statement* when compared to the April 8th, 1975, Article (R. 108 and 109)

(c) That the comment (paragraph No. 3 of the April 9, 1975, article) "under Ohio Law private investigators must inform authorities *12 hours in advance* of participation in a case" *was a false statement* when compared to Ohio Revised Code 4749.05 (R. 101, 102, 103 at line 13)

(d) That the April 9th, 1975, Article, which accused Appellant of violating Ohio Law twice (paragraph No. 5) *was false*, since prior news articles stated there had been no obstruction of justice. (R. 105, 106 and 107 at line 5)

(e) That the April 9, 1975, Article at paragraph No. 5 states "*if* he is qualified as a licensed private investigator", when the prior article states *he was* a licensed investigator. (R. 110 at line 24)

(f) That Yockey "*TOTALLY DISREGARDED WHATEVER THE TRUTH WAS AND PRINTED WHAT HE WANTED TO PRINT*" (R. 111 lines 19 through 23)

(g) That Yockey after receiving the requested retraction from Appellant's Counsel, spoke to his Counsel, Richard Hanhart, and *then changed the requested retraction*. (R. 114, 115, 116, 123 and 124)

(h) That the requested retraction was not printd in the same place and location of the April 9, 1975, Article. (R. 125 lines 10 through 21)

Defendant (Respondent herein) moved for Summary Judgment which was denied in April 1978. See Appendix C, *infra*, for the Judgment Entry of this denial and accompanying Memorandum.

The trial proceeded to a conclusion with a jury rendering its verdict supported by jury interrogatories in favor of Petitioner herein.

Respondent herein appealed this verdict to the Fifth Appellate District, Tuscarawas County, Ohio who on December 20th, 1979, rendered its opinion and judgment in favor of Respondent. The Court of Appeals based its decision basically on the ground that the evidence at the Summary Judgement stage did not prove actual malice, and Respondent's Motion for Summary Judgment and Directed Verdict should have been sustained, that the subject article was an expression of opinion and therefore not libelous, and that Revised Code Sections 2739.13 and 2739.14 are unconstitutional. Petitioner, in his reply brief in this appeal, argued the following:

> The Trial Court properly overruled Appellant's Motion for Summary Judgment and its' constitutional rights were protected to the extent allowed by law.
>
> A Jury Verdict supported by interrogatories which responds definitely and certainly to the issues and honors the rights of the parties should not be set aside.

Notice of Appeal to the supreme court of Ohio was filed by Petitioner on January 10th, 1980. The Memorandum in Support of Jurisdiction was filed on February 8th, 1980 and said cause accepted for hearing on the merits on or about September 23rd, 1980. The Propositions of law relevant to this Petition argued by Petitioner were:

> In a libel case, the state of mind of the writer (or Editor), at the time of publishing the libel is a question for the Jury, and actual malice may be proved by direct as well as indirect and cumulative evidence.
>
> In a libel case, where it appears from the evidence that reasonable minds could differ as to which employees or a combination thereof had responsiblility for the publication of the alleged libel, the Defendant's Motion for summary Judgment must be overruled.
>
> In a libel case, where there is an admission by the author of the alleged libel "that he totally disregarded what the truth was and printed what he wanted to print", and where the false statements constituting the alleged libel are inconsistent with prior news stories published by the Defendant newspaper, reasonable minds could differ as to the author's state of mind at the time of publishing the alleged libel and the Defendant's Motion for a directed Verdict must therefore be overruled.
>
> Where a trial Court erroneously overrules a Motion for Summary Judgment but evidence is adduced at trial indicating the existence of genuine issue as to a material fact, the error is harmless and should be disregarded on appeal.
>
> When interrogatories are submitted to a jury and specific findings of fact are made in answer

to said interrogatories, the Court of Appeals may not review the trial record and substitute its findings of fact contrary to those specific findings of fact by the jury.

The Supreme Court of Ohio rendered its decision on December 17th, 1980 holding that the Court of Appeals was correct in finding that the trial Court erred in not granting Respondent's Motion for Summary Judgment. The Court, however, reversed the Court of Appeals conclusion that Revised Code Section 2739.13 and 2739.14 are unconstitutional in that the Court of Appeals had no occasion to pass on their constitutionality and erred in so doing.

Petitioner filed a Motion for Rehearing before the Supreme Court of Ohio on December 29th, 1980 on the grounds that the decision rendered by the Ohio State Supreme Court was contrary to the decision of the United States Supreme Court in the case of *Hutchinson v. Proxmire*, 433 U. S. 111 (1979). The Ohio State Supreme Court overruled Petitioner's Motion for Rehearing on January 22nd, 1981. See Appendix E, *infra*.

REASONS FOR GRANTING THE WRIT.

WHEN A JURY ANSWERS QUESTIONS SPECIFICALLY FINDING ACTUAL MALICE BY CLEAR AND CONVINCING EVIDENCE AT THE TIME OF PUBLICATION, A REVERSAL BY A REVIEWING COURT AT THE PRE-TRIAL SUMMARY JUDGMENT STAGE VIOLATES THIS COURT'S DECISION ENUMERATED IN THE *HUTCHINSON V. PROXMIRE* RULING AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION RENDERED IN THE *HUTCHINSON V. PROXMIRE* CASE AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

There is no question that Petitioner, as a Dover City Councilman and candidate for Mayor, was a public official, so that the defamatory nature of the newspaper article levied against him is to be judged by the actual malice standard of *New York Times v. Sullivan*, 376 U. S. 254 (1964). This standard "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" - that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times v. Sullivan*, 376 U. S. 254, 279-280. This standard has been further defined as focusing on Defendant's attitude toward the truth or falsity of the publication, *Herbert v. Lando*, 441 U. S. 153 (1979); the public official may recover only upon clear and convincing proof of actual malice. *Gertz v. Robert Welch Inc.*, 418 U. S. 323, 342 (1974); *New York Times v. Sullivan*,376 U. S. 254, 285-286. It must be shown that the false statements were made with a "high degree of awareness of their probable falsity" *Garrison v. Louisana*, 379 U. S. 64 (1964). It must also be shown that the actual malice is to be measured at the time of publication *New York Times v. Sullivan*, 376, U. S. 254, 286. As the Court is aware, this is a high standard for a Plaintiff to meet. Petitioner does not question this standard. Rather, Petitioner brings forth the issue of whether or not the Ohio Supreme Court can decide the factual issues of a libel case involving a public figure and a newspaper at the summary judgment stage after a jury verdict supported by jury interrogatories had decided the same issues, in light of recent United States Supreme Court decisions and the Federal Constitution.

As previously stated, Petitioner brought this libel action against Respondent newspaper. Respondent filed a Motion for Summary Judgment pursuant to Rule 56 of the Ohio Rules of Civil Procedure. On proper review of

the evidence submitted at that point, the trial Court, with opinion, overruled Respondent's Motion. See Appendix C, *infra*. The trial Court stated:

> For the purposes of this opinion, the Court will assume that the Plaintiff was a public official and that the Defendant is entitled to the First Amendment rights.

As such, though not explicitly stated, the trial Court was following the standards as set forth by *New York Times v. Sullivan*, and its progeny. Also indicative that the *New York Times* standard was followed is that the trial Court used the "clear and convincing proof" test in stating that reasonable minds could find the facts as presented to the court at that time. The actual holding of the trial Court on Respondent's Motion for Summary Judgment was:

> Applying the rules for construction of affidavit and other materials, reasonable minds could conclude, but not necessarily so, that false statements were published with knowledge of falsity and intentionally or recklessly. the Motion for Summary Judgment should, therefore, be overruled. Appendix C, *infra*.

A trial on the merits was had whereby a jury verdict in favor of petitioner was rendered. The bare fact that a jury verdict in favor of Petitioner was returned is not the point around which this case revolves. Rather it is the interrogatories submitted to the Jury and answered. The interrogatories were as follows:

> (1) (THIS APPENDIX G) DO YOU FIND THAT ANY OF THE STATEMENTS CONTAINED IN DEFENDANT'S EDITORIAL OF APRIL 9, 1975 PLAINTIFF'S EXHIBIT A WAS FALSE?
>
> ANSWER: ALL EIGHT JURORS STATE "YES"

TO THIS INTERROGATORY.

(2) (THIS APPENDIX G) IF YOU FIND THAT ANY OF THE STATEMENTS CONTAINED IN DEFENDANT'S EDITORIAL APRIL 9, 1975 (PLAINTIFF'S EXHIBIT A) WAS FALSE, DO YOU FIND BY CLEAR AND CONVINCING EVIDENCE THAT ANY OF SAID STATEMENTS WAS MADE WITH ACTUAL MALICE AT THE TIME OF PUBLICATION?

ANSWER: SIX OUT OF EIGHT JURORS REPLIED "YES" TO INTERROGATORY NO. 2.

These Jury interrogatories and the answers thereto show convincingly that the jury in this case applied the law as stated in *New York Times v. Sullivan* in a reasonable manner. This was, however, completely ignored by the Ohio Supreme Court. The Ohio Supreme Court, in reviewing this case, focused their entire attention upon Respondent's Motion for Summary Judgment.

> We review the trial court's ruling on appellee's Motion for summary judgment. In so doing, this Court must, as did the Court in *New York Times*, supra, at page 285, "make an independent examination of the whole record."
>
> Summary judgment shall be rendered *** if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact in that the moving party is entitled to judgment as a matter of law. Civ. R. 56 (C) (Dupler v. Journal Co., 64 Ohio St. 2d 116, 119-120 (1980)).

> Applying the foregoing principal to the evidence before the trial Court on Appellee's motion for summary judgment, we find that the lower Court erred in not granting the motion. *Dupler v. Journal Co.*, 64 Ohio St. 2d 116, 121.

In deciding this case solely at the Summary Judgment stage, the Ohio Supreme court contradicted their own citation of the *New York Times* case in that the Ohio Court was to "make an independent examination of the *whole record*". *Dupler v. Journal Company*, 64 Ohio St. 2d. 116, 120. (Emphasis Added). If the Ohio Supreme Court had made such an independent examination of the *whole record*, it would have examined the interrogatories answered by the jury, those interrogatories being despositive of the issued at hand. The Ohio Supreme Court, however, sat as a trier of fact upon an incomplete record.

> It is not sufficient for a libel Plaintiff to show that an interpretation of facts is false; rather, he must prove with convincing clarity that Defendant was aware of a high probalility of falsity. *Dupler v. Journal Co.*, 64 Ohio St. 2d 116, 122-123.

In other words the inquiry is to be centered on Defendant's attitude towards the truth or falsity of the publication, *Herbert v. Lando*, 418 U. S. 153, 160 (1979). Of course, when one looks upon an attitude of an individual or individuals, one is looking at their state of mind. When the state of mind is brought into question in this type of case this situation does not lend itself to summary disposition. *Hutchinson v. Proxmire*, 443 U. S. 111, 120 n9 (1979). The Ohio Supreme Court's opinion points up the infirmities of deciding this particular case at the summary judgment stage. That Court states at page 123, *Dupler v. Journal Co.*, 64 Ohio St. 2d 116, they are unconvinced that Yockey (the Editor) must have

known he was falsely interpreting the Ohio Notification Statute. (See Apendix K, *supra.*) That Court stated that the said Notification Statute may be subject to differing interpretations and that while a perusal of the Ohio Revised Code may have convinced the Editor that he was misinterpreting statute:

> An investigatory failure alone..., without a high degree of awareness of probable falsity, may raise the issue of negligence but not the issue of "actual malice". *Tagawa v. Mauwe Publishing Co.*, (Hawaii 1968) 448 P. 2d 337, 340. *Dupler* at 123.

The *Tagawa* case, however, would indicate by the language "without a high degree of awareness of probable falsity" that if a high degree of awareness of probable falsity was found, the issue of actual malice could be reached. This brings us back to deciding the issue of state of mind to which the *Hutchinson v. Proxmire* case indicates that summary judgment is inappropriate. It also brings to the fore the fact that the jury interrogatories indicate that the jury here did find that there was an awareness of a high probability of falsity. (See Interrogatory #1, Appendix G, *infra.*)

In the paragraph immediately following the above discussion, the Ohio Supreme Court stated:

> Additionally, Appellant's contention that Yockey was aware of the falsity of his editorial inference of an illegal seizure by Dupler is also without merit. *Dupler* at page 123.

At the end of that paragraph appears this sentence:

> It is readily apparent that the aim of the editorial was to criticize the Prosecutor's Office for the handling of this affair. *Seen in this light,* it can hardly be presumed that Yockey should accept the truth of an opposite legal conclusion

> espoused by the very same office he was criticizing. *Dupler v. Journal Co.*, 64 Ohio St. 2d 116, 123-124. (Emphasis Added)

Once again the Ohio Supreme court shows how a summary judgment can be misused in a libel action. That court in deciding the case at the summary judgment level is barred from weighing evidence or choosing among reasonable inferences. *Dupler v. Journal Co.*, 64 Ohio St. 2d 116, 121. In ruling on such a Motion, the court is limited to examining the evidence " taking all permissable inferences and resolving questions of credibility in Plaintiff's favor to determine whether *reasonable minds could find actual malice with convincing clarity*. *Dupler* at 121. That Court also quoted the Ohio Rules of Civil Procedure 56 (C):

> The moving party carries the burden of proving that no genuine issue of fact exists, and all reasonable inferences shall be resolved in favor of the opposing party

But that Court did precisely the opposite. Obviously the Ohio Supreme Court resolved the inference of the article "in the light" most favorable to the moving party, that is, the Respondent newspaper. In so doing, it permitted themselves to once again ignore the jury interrogatories which answered the issues of actual malice in this case.

Finally that Court dismissed Petitioner's contention that the statement from the article, "if he (Petitioner) is qualified as a licensed private investigator," *Dupler* at 124, was made with knowing falsity because the Editor knew from prior articles that Petitioner was acting as a private investigator as being nothing more than a rhetorical question. Once again this raised an issue of fact, a fact which the jury effectively answered.

That Court then directed its attention as to the exact time as to when malice is to be measured. Quoting from

the Court below:

> Yockey's admissions at deposition that he now believes that three editorial comments directed toward Dupler are false is irrelevent. as stated in *Glover v. Harrold Co.* (Mo. 1977,) 549 S. W. 858, 861, "Actual malice is to be measured at the time of publication" (emplasis added by the Ohio Supreme Court). Accord, *New York Times*, supra, at page 286. The fact that Yockey changed his position over one year after the editorial, when presented with additional facts, is not evidence of a state of mind when he wrote the editorial. *Dupler*, at page 124

Clearly, summary judgment was again misused by the Court below to avoid the specific answer of Interrogatory No 2 whereby the jury found by clear and convincing evidence that the publication was published with actual malice *at the time of publication.* (See Interrogatory #2 Appendix G, *infra.*)

The Court summed up its opinion by stating:

> having re-examined all the evidence before the trial Court on the motion for summary judgment, and taking all reasonable inferences in the light most favorable to the Appellant, we find that a jury acting reasonably could not find actual malice of convincing clarity. Therefore summary judgment should have been granted for Appellee. *Dupler* at page 124

This paragraph is further indicative that the State Supreme Court ignored the jury's findings of fact which it used to reach its verdict. The foot note number 6 that the foregoing paragraph referred to states:

> in light of this conclusion, it is unnecessary for this Court to review the Court of

> Appeals determination that Defendant's motion for directed verdict should also have been granted. However, we do note that there was no *additional evidence* adduced at trial from which a reasonable jury could find actual malice, at the time of publication, with convincing clarity. *Dupler* at 124. (Emphasis added)

However on page 111 of the trial record the following appears:

QUESTION: TRIPODI... SO WHAT, IN FACT, DID YOU THEN MR. YOCKEY, WAS TOTALLY DISREGARDED WHATEVER THE TRUTH WAS AND PRINTED WHAT YOU WANTED TO PRINT?

ANSWER: YOCKEY... I WOULD HAVE TO SAY YES.

Therefore, there was additional evidence upon which a reasonable mind could find actual malice at the time of publication with sufficient clarity. From the foregoing it is clear that the Supreme Court of Ohio rendered its decision in total disregard to a reasonable jury acting reasonably that found for Petitioner according to the standards set forth in *New York Times v. Sullivan*. It is Petitioner's contention that this is contrary to both Federal Constitutional Law and Case Law of the United States Supreme Court.

Ever since the landmark case of *New York Times v. Sullivan* was decided, the Courts of this nation have struggled to find the proper balance between a newspaper's First Amendment rights of speech and press and an individual's right to be free from libel. The Courts, in weighing the scale heavily in favor of the First Amendment have been very liberal in utilizing summary procedures. (See eg note 4 in *Dupler v. Mansfield Journal Co.*, page 121) listing numerous cases where summary judgments were granted in favor of Defendants).

Indeed, until recently, the granting of Defendant's summary judgment motion in these type of libel suits seemed to have been developing into a general rule. This Court then decided the case of *Hutchinson v. Proxmire*, 443 U. S. 111 (1979), where this Court reversed the granting of a summary judgment to a defendant, intimating that the issues involved in a libel action brought by a public figure are too complex to be dealt with by summary judgment. *Hutchinson v. Proxmire*, 443 U. S. 111, 120 n9. This Court disagreed with the position taken by the Federal District Court that in determining whether Plaintiff had made an adequate showing of "actual malice", summary judgment should be the rule rather than the exception:

> Considering the nuances of the issues raised here, we are constrained to express some doubt about the so called "rule". The proof of "actual malice" calls a defendants state of mind into question, *New York Times v. Sullivan*,... and does not readily lend itself to summary disposition. *Hutchinson v. Proxmire* 433 U. S. 111, 120 n9.

This Court therefore recognized the fact that Plaintiffs can prevail in these sort of libel actions and that questions of actual malice are properly, and indeed should be, submitted to a jury. When faced squarely with the *Hutchinson* case in Petitioner's motion for rehearing to the Ohio State Supreme Court, raising this exact issue, that Court decided not to rehear Petitioner's case. (Appendix D and E, *infra*.) As such, the State of Ohio does not recognize *Hutchinson v. Proxmire* and the proposition it stands for.

As the right to a trial by jury in civil cases in Federal Courts is a matter of Federal Constitutional mandate, U.S. Const. Amend. VII, so too is a right of a civil litigant to a trial by jury in the State of Ohio. The Ohio

Constitution states:

> The right of tial by jury shall be inviolate, except that, in civil cass, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury. Ohio Const. of 1851, Art. I, 5 (amended 1912).

Petitioner's right to a trial by jury in Ohio is guaranteed by the State Constitution and cannot be invaded or violated by either legislative act or judicial order or decree. *Gibbs v. Village of Gerard*, 88 Ohio St. 34, syll. 2 (1913).

When the Onio State Supreme Court rendered its decision in Petitioner's case limiting its inquiry to the motion for summary judgment, it took it upon itself to decide factually the motive and intent of the editor at the time of the publication. If the case had been filed in Federal Court, this type of action would not be tolerated.

> Summary judgments have a place... though as we warned in *Poller v. Columbia Broadcasting Systems, Inc.*, they are not appropriate "where motive and intent play leading roles" *White Motor Co. v. United States*, 372 U. S. 253, 259 (1963).
>
> Rule 56 (c) Fed Rules Civ. Proc. This rule authorizes summary judgment only where the moving party is entitled to judgment as a matter of law. Where it is quite clear what the truth is... (and where) no genuine issue remains for trial... (for) the purpose of this rule is not to cut litigants off from their right of trial by jury if they really have issues to try. *Poller v. Columbia Broadcasting Systems, Inc.*, 368 U. S. 464, 468 (1961).
>
> While it is true that the Seventh Amendment has

never been applied directly to the states, *Minneapolis and St. Louis Railroad v. Bombolis*, 241 U. S. 211 (1915), the Ohio State Supreme Court did deny Petitioner a right to a jury trial and verdict even though there were issues of fact concerning actual malice and falsity of the newspaper's publication. *Hutchinson v. Proxmire*, 443 U. S. 111 (1979).

When the Ohio Supreme Court denied Petitioner of his jury verdict in this particular manner - that jury verdict guaranteed by the Ohio Constitution - it amounted to a taking of Petitioner's property without due process of law, violative of the Fourteenth Amendment of the United States Constitution.

THERE IS CONFUSION AMONG THE SEVERAL STATES AND VARIOUS FEDERAL COURTS ON THE PROPRIETY OF THE USE OF SUMMARY JUDGMENTS IN DECIDING THE ISSUE OF ACTUAL MALICE IN LIBEL CASES REQUIRING A CLARIFICATION BY THE UNITED STATES SUPREME COURT.

The decision reached by the Ohio State Supreme Court in the instant case is in conflict with the highest appellate Courts of several other states. The Supreme Court of Appeals of West Virginia in *Spouse v. Clay Communications Inc.*, 211 S. E. 2d 674, 689-690 (1975) stated:

> [H]istorically since *New York Times* the clearest legal principal emerging from a reading of libel cases is that each case must be considered by an appellate Court on its facts with a strong sympathy toward protection of the robust political discussion contemplated by the First Amendment. At some point, however, cumulative evidence will show that the line of protection is breached and a jury *must* be permitted to find malice, unless we are to

> adopt the position, articulated by Mr. Justice Black and Mr. Justice Douglass, that proper application of the First Amendment provides an absolute defense for the press to all defamation actions. (emphasis added)

The Ohio State Supreme Court does not recognize such a line in that, as previously stated, a jury found that line was crossed but the Supreme Court did not recognize the right of a jury to so find. In fact, it did not recognize the jury at all.

The Supreme Court of California in *Good Government Group of Seal Beach, Inc., v. Superior Court of Los Angeles County*, 586 P. 2d 572. 150 Cal. Rptr. 258 (1978), denied petition for a writ of mandate to compel a trial Court to grant a defendant's motion for summary judgment in a libel action brought by a former City Councilman filed against the Good Government Group of Seal Beach, Inc. for allegedly libelous comments published in a local homeowners association newsletter. The California Supreme Court denied the writ on the ground that (1) in a libel action brought by a former city councilman, substantial fact issue existed as to whether the article in question, which included references to extortion and blackmail was factual nature or constituted an opinion, precluded summary judgment and (2) where allegedly libelous remarks could have been understood by the average reader as either a statement of fact or statement of opinion, the issue must be left to a jury's determination, and (3) any substantial fact issue existed as to the existence of malice in the article which also precluded summary judgment. Unlike the Supreme Court of Ohio, the Supreme Court of California does recognize that fact issues do exist and that a fact issue existing as to the existence of malice would preclude a summary judgment.

The District of Columbia Court of Appeals in *Nader*

v. Toledano, 408 A. 2d 31 (1979), in recognizing *Hutchinson v. Proxmire* stated because of the compelling First Amendment interest at stake, it will regard summary judgment as a useful method of disposing of constitutional libel action - "*where appropriate*". 408 A. 2d 31, 44 (1979). The situation presented in the instant case shows that (1)there was a substantial issue of fact at the summary judgment stage so that the denying of a summary judgment was appropriate and (2) from the facts solicited at trial (Yockey's admission that he printed what he wanted without regard to the truth), and the jury in answering its interrogatories show that even if it was arguably appropriate to grant the summary judgment in this case, the failure to do so was harmless error. The Ohio Supreme Court, unlike the District of Columbia Court of Appeals, did not limit itself to the proposition that summary judgment should be granted only *when appropriate*.

Finally the Supreme Court of New Hampshire in *Thompson v. Cash*, 402 A. 2d 651 (1979), held that although words complained of, taken in context, where not such that their meaning was unequivocally defamatory, readers of ordinary intelligence and common understanding could reasonably have understood the words as implying fraud or wrongdoing, and since words were susceptible to more than one meaning, whether they were used in the defamatory sense was *question of fact*, 402 A. 2d 651, 656. As in the New Hampshire case, Petitioner presented an issue of fact as to whether or not there was actual malice involved in the subject publication. In New Hampshire, that would preclude a summary judgment, in Ohio it does not. Indeed the fact that the Ohio Supreme Court, by ignoring the jury and the answers to the jury interrogatories in the instant case, actually held as a matter of law that there was no malice. Clearly the Supreme Courts of Ohio and New Hampshire are in complete opposites of

the spectrum on this issue and review by this Court is necessary to resolve this matter for the states.

There is also confusion in the Federal Courts as to this same issue. In *Ciani v. New Times Publishing Co.* 486 F. Supp. 368, 371 (S.D.N.Y. 1979). the United States District Court stated:

> Plaintiff's contention that recent Supreme Court cases have somehow overruled these basic principles of First Amendment law is an unfortunate misperception. For example, the Court's decision in *Herbert v. Lando*, supra, while acknowledging the individual's interest in his reputation as a basic concern, explicitly recognized the basic principles set forth in *New York Times v. Sullivan* and subsequent cases... Plaintiff may agree or disagree with the merits of the specific issues discussed in *Herbert v. Lando*, but for the purposes of the present motion the Court need only note the obvious -that *Herbert v. Lando* should not be read as unraveling the entire tapestry of First Amendment safeguards woven by the Supreme Court over the last fifteen years.
>
> Similarly, Plaintiff attempts to avoid the issues at hand by seizing upon the Supreme Court's dictum in a foot note in *Hutchinson v. Proxmire*... "The proof of "actual malice" calls a defendant's state of mind into question... and does not readily lend itself to summary disposition...in the present posture of the case, however, the propriety of dealing with such complex issues by summary judgment is not before us." This dictum is simply of no relevance to the present motion, which raises no issue of actual malice or state of mind. Instead, the general principle followed in this Court is fully applicable.

Compare this with *Church of Scientology of California v. Siegelman*, 475, F. Supp. 950, 956 (S. D. N. Y. 1979), where the same District Court stated:

> Turning finally to the alleged defamatory remarks made by Defendant Deutsch on the Susskind show, the Court finds that questions exist which preclude disposition at this time. The statements attributed to Deutsch are, unlike the ones attributed to the other defendants, defamatory statements of fact. Deutsch asserts as a defense both that he believes the statements to be true and that, in any event, they were all made without actual malice. He also asserts that the statements alleged were not addressed to these Plaintiffs were neither defamed nor damaged. Finally, he claims that the utterances in the complaint were so edited and placed out of context as to be thoroughly misleading. These defenses, however, raise questions of fact which *cannot be decided at this time. See Proxmire v. Hutchinson...* (Emphasis added)

It can be seen that, as with the several states, the Federal Courts are also in a state of confusion as to how to properly handle a motion for summary judgment presented to them. It is Petitioner's contention this Court was correct in *Hutchinson v. Proxmire* that when a state of mind is presented concerning the issue of actual malice in a libel action of this sort, summary judgment is inappropriate and the case should be submitted to a jury.

SEE ALSO *Yiamouyiannis v. Consumer Union of the United States inc.*, 619 F. 2d 932 (1980), United States Court of Appeals for the Second Circuit stated on page 940:

> Until more directly advised, we think that this

> neutral approach correctly states the rule as it is presently in force: neither grant nor denial of a motion for summary judgment is to be preferred. Defamation actions are, for procedual purposes, such as discovery, see *Herbert v Lando*...or for summary judgment, to be treated no differently from other actions; any "chilling effect" caused by the defense of a lawsuit itself, see *Herbert v. Lando*...*Washington Post Co. v Keogh*...is simply to be disregarded, to have no force and effect.

This case points out the confusion the Federal Courts are facing at this time, their need for direction, the polar opposite view that the Ohio State Supreme Court takes in this situation.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Supreme Court of Ohio.

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CERTIFICATE OF SERVICE

The undersigned, being co-counsel of record for Petitioner and members of the Bar of this Court, do certify that three (3) copies of this Petition for a Writ of Certiorari to the Supreme Court of Ohio/Brief of Petitioner were hand delivered to the office of Richard M. Hanhart, Esq., co-counsel for Respondent, 405 Chauncey Ave., N.W., New Philadelphia, Ohio 44663, Ph: 216-343-5585; and to the office of William A. Kyler, Esq., co-counsel for Respondent, 405 Chauncey Ave., N.W., New Philadelphia, Ohio 44663, Ph: 216-343-5585; on the 21st day of April, 1981.

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CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

JERRY DUPLER,

Petitioner,

v.

MANSFIELD JOURNAL CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

APPENDIX

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

JERRY DUPLER,
Petitioner,

v.

MANSFIELD JOURNAL CO.,
Respondent.

APPENDIX "A"
OPINION AND JUDGMENT OF
OHIO SUPREME COURT

---

1. In ruling upon defendant's motion for summary judgment in a libel action brought by a public official, the court shall consider the evidence and all reasonable inferences to be drawn therefrom in the light most favorable to the plaintiff to determine whether a reasonable jury could find actual malice with convincing clarity.
2. In considering defendant's motion for summary judgment in a libel action brought by a public official, if the court finds that there is no genuine issue of material fact from which a reasonable jury could find actual malice with convincing clarity it must enter judgment for defendant.

This cause arose as a libel action by plaintiff-appellant, Jerry L. Dupler, against defendant-appellee, Mansfield Journal Co., Inc., on the basis of an editorial appearing in the April 9, 1975, edition of

The Times-Reporter, a newspaper owned by the appellee and published in New Philadelphia, Ohio. The article, written by appellee's editor, Harry Yockey, criticized the county prosecutor's decision not to prosecute Dupler for his alleged misconduct, as a private investigator, in recovering stolen property for a client.[1] At that time, appellant was a city councilman in Dover, Ohio, and a candidate for mayor of that community.

The record indicates that appellant notified Dover and New Philadelphia police on March 25, 1975, of his involvement in the case and his intent to recover a stolen stereo from a local apartment. Police declined to assist Dupler because they lacked a search warrant. Dupler and his client evidently received the consent of a man at the apartment to conduct a search, although

[1]The full text of the April 9, 1975, editorial reads as follows:

"The Tuscarawas County prosecutor's reaction to the seizure of a stolen stereo set and several other items at a New Philadelphia apartment by Jerry Dupler, Dover councilman and a private eye , is somewhat surprising.

"Prosecutor Ron Collins indicated there would not be any prosecution because of 'a lack of criminal intent.'

"Private investigators, under Ohio law, must inform authorities 12 hours in advance of participation in a case. The prosecutor revealed he had been contacted about a search warrant the night Dupler, acting in behalf of Brad Dinolfo, made the seizure. However, the prosecutor said he didn't think police had 'sufficient justification' for a warrant.

"The prosecutor's office, we are certain, prosecutes numerous cases wherein 'criminal intent' is not evident. J.C. Shew, an assistant prosecutor, added that their office isn't concerned that Dupler, employed by Cloverleaf Security, had not informed police of his intentions. Nor is the prosecutor's office concerned over the fact that Dupler did not have a search warrant.

"It seems to us that Dupler, if he is qualified as a licensed private investigator, ignored Ohio law twice—by not giving authorities the proper notification and then by making a seizure without a search warrant.

"It is proper to ask, in view of the circumstances, what the intent was behind Dupler's actions. It also is proper to ask if the prosecutor's office is politically motivated in its unconcern.

"If Jerry Dupler is going to continue his work as a private eye the prosecutor's office should at least make certain he refrains in the future from ignoring Ohio statutes."

it was never determined whether this individual actually was a resident of the premises. Dupler and his client recovered the stereo and other property which they turned over to police at the scene.

Articles appearing in the April 4 and April 8, 1975, editions of The Times-Reporter described the reactions of the New Philadelphia police chief and the local prosecutor's office to Dupler's unorthodox tactics in this matter, and the prosecutor's decision not to charge Dupler with violating state law in his method of intervention. Yockey's subsequent editorial criticized this decision not to prosecute. Appellant's defamation suit ensued.

Prior to trial, defendant filed a motion for summary judgment which was overruled. At trial, plaintiff presented evidence that defendant failed to comply with R. C. 2739.13 and 2739.14, in printing an editorial retraction submitted by plaintiff in August 1975. At the close of plaintiff's case-in-chief and at the close of all evidence, defendant moved for a directed verdict in his favor, on the basis that plaintiff had not met his burden of proving that the allegedly libelous comments were made with actual malice. Both such motions were effectively overruled. The jury returned a verdict for plaintiff in the amount of $149,000.

The Court of Appeals subsequently reversed and entered judgment for defendant. It found that the trial court erred in not granting defendant's motions for summary judgment and directed verdict, because there was no evidence presented that Yockey knew, at the time of publication, that his comments were false or, in fact, entertained serious doubts as to their truth. The appellate court also found that R. C. 2739.13 and 2739.14, the so-called "retraction statutes," were unconstitutional as infringing upon defendant's First Amendment rights.

The cause is now before this court pursuant to the

allowance of a motion to certify the record.

Mr. Joseph I. Tripodi and *Mr. James R. Barnhouse,* for appellant.

Messrs. Smith, Renner, Hanhart, Miller & Kyler, Mr. Richard M. Hanhart and *Mr. William A. Kyler,* for appellee.

I.

SWEENEY, J. It is uncontroverted that appellant, as a Dover city councilman and mayoral candidate, was a public official, so that the defamatory nature of the editorial criticism leveled against him is to be judged by the actual malice standard of *New York Times Co.* v. *Sullivan* (1964), 376 U. S. 254.[2] This standard "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.,* at pages 279-280.

This concept of actual malice has been further refined by subsequent decisions of the United States Supreme Court. Actual malice may not be inferred from evidence of personal spite, ill-will or intention to injure on the part of the writer. *Beckley Newspapers Corp.* v. *Hanks* (1967), 389 U. S. 81, 82; *Rosenblatt* v. *Baer* (1966), 383 U. S. 75, 84. Rather, the focus of inquiry is on defendant's attitude toward the truth or falsity of the publication, *Herbert* v. *Lando* (1979), 441 U. S. 153, 160; and a public official may recover only upon clear and convincing proof of actual malice. *Gertz* v. *Robert Welch, Inc.* (1974), 418 U. S. 323, 342;

[2]The primary thrust of appellant's complaint was that appellee defamed him by alleging in its editorial that Dupler twice violated Ohio law. As noted in *Monitor Patriot Co. v. Roy* (1971), 401 U.S. 265, 277, "a charge of criminal conduct, no matter how remote in time or place, can never be irrelevant to an official's or a candidate's fitness for office for purposes of application of the 'knowing falsehood or reckless disregard' rule of *New York Times v. Sullivan.*".

New York Times, supra, at pages 285-286. There must be a showing that false statements were made with a "high degree of awareness of their probable falsity***." *Garrison* v. *Louisiana* (1964), 379 U. S. 64, 74.

Since reckles disregard is not measured by lack of reasonable belief or of ordinary care, even evidence of negligence in failing to investigate the facts is insufficient to establish actual malice. Rather, since "erroneous statement is inevitable in free debate, and ***must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive,'***" *(New York Times, supra,* at pages 271-72), "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant* v. *Thompson* (1968), 390 U. S. 727. 731.

II.

It is against this pervasive backdrop of First Amendment protection for published criticisms of public officials that we review the trial court's ruling on appellee's motion for summary judgment. In so doing, this court must, as did the court in *New York Times, supra,* at page 285, " 'make an independent examination of the whole record,'***so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression."

"Summary judgment shall be rendered***if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Civ. R. 56(C). The moving party carries the burden of proving that no genuine issue of fact exists,

and all reasonable inferences shall be resolved in favor of the opposing party. Summary judgment is admittedly "a drastic device since its prophylactic function, when exercised, cuts off a party's right to present his case to the jury." *Heyman* v. *Commerce and Industry Ins. Co.* (C.A. 2, 1975), 524 F. 2d 1317, 1320. However, courts have not hesitated to grant such a motion where "it is plain that the record has been fully developed by depositions and affidavits***and such record demonstrates that, construing all the facts and inferences to be drawn therefrom in favor of the party against whom the judgment is entered, he would not be entitled to have a jury verdict stand***." *Time, Inc.* v. *McLaney* (C.A. 5, 1969), 406 F. 2d 565, 572.[3]

Summary procedures are especially appropriate in the First Amendment area. "The threat of being put to the defense of a lawsuit brought by a popular public official may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself***. Unless persons, including newspapers, desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors. And to this extent debate on public issues and the conduct of public officials will become less uninhibited, less robust, and less wide-open, for self-censorship affecting the whole public is 'hardly less virulent for being privately administered.' " *Washington Post Co.* v. *Keogh* (C.A.D.C. 1966), 365 F. 2d 965,968.

While summary judgment has been liberally utilized, at both federal and state levels, to dispose of

[3]The Ohio summary judgment rule is patterned after Fed. R. Civ. P. 56; and it is clear that, especially in the area of First Amendment rights, Ohio courts will follow the same approach as taken by federal courts in deciding summary judgment motions.

libel actions having First Amendment implications,[4] it must be remembered that "[p]rinciples applicable to summary judgment motions generally, are applicable to such motions when made in a defamation action." *Hotchner* v. *Castillo-Puche* (S.D.N.Y. 1975), 404 F. Supp. 1041, 1050. Thus, a trial court may not weigh the proof or choose among reasonable inferences. In ruling on such a motion, the court is limited to examining the evidence "taking all permissible inferences and resolving questions of credibility in plaintiff's favor to determine whether *a reasonable jury acting reasonably could find actual malice with convincing clarity.*" *Nader* v. *deToledano* (D.C. App. 1979), 408 A. 2d 31, 50. (Emphasis *sic.*).

III.

Applying the foregoing principle to the evidence before that trial court on appellee's motion for summary judgment, we find that the lower court erred in not granting the motion. The evidence presented primarily concerned the allegedly defamatory nature of the following paragraph of the April 9, 1975, editorial:

"It seems to us that Dupler, if he is qualified as a licensed private investigator, ignored Ohio law

[4]In the following instances, summary judgment was granted where plaintiff had failed to produce evidence from which a jury could find that actual malice had been established with convincing clarity: *Yiamouyiannis* v. *Consumers Union of the United States, Inc.* (C.A. 2, 1980), 619 F. 2d 932; *Meeropol* v. *Nizer* (C.A. 2, 1977), 560 F. 2d 1061, 1064-1066; *Fadell* v. *Minneapolis Star & Tribune Co., Inc.* (C.A. 7, 1977), 557 F. 2d 107, 108;; *Hoffman* v. *Washington Post Co.* (C.A.D.C. 1977), 443 F. Supp. 600; *Walker* v. *Cahalan* (C.A. 6, 1976), 542 F. 2d 681, 684; *Perry* v. *Columbia Broadcasting System, Inc.* (C.A. 7, 1974), 499 F. 2d 797, 801-802; *Cerrito* v. *Time, Inc.* (C.A. 9, 1971), 449 F.2d 306: Bon Air Hotel, Inc. v. *Time, Inc.* (C.A. 5, 1970), 426 F. 2d 858; *Tagawa* v. *Maui Publishing Co.* (Hawaii 1968), 448 P. 2d 337; *Tait* v. *King Broadcasting Co.* (1969), 1 Wash. App. 250, 460 P. 2d 307; *Time, Inc.* v. *McLaney* (C.A. 5, 1969), 406 F. 2d 565, 572; *Suchomel* v. *Suburban Life Newspapers, Inc.* (1967), 84 Ill. App. 2d 239, 228 N.E. 2d 172; *Washington Post Co.* v. *Keogh* (C.A.D.C. 1966), 365 F. 2d 965.

twice—by not giving authorities the proper notification and then by making a seizure without a search warrant."

Yockey testified at deposition that the instant editorial was based entirely on the two prior news articles written by appellee's staff reporters and appearing in the April 4 and April 8, 1975, editions of The Times-Reporter. The April 4th report attributes to New Philadelphia police the assertion that Dupler violated a Revised Code section which requires that a private investigator give police "12 hours advance notice" of his involvement in a case. The April 8th story repeated this interpretation of the notification statute but quoted the local prosecutor to the effect that, if Dupler did violate this law, he would not be prosecuted because of "lack of criminal intent." The statute in issue, R. C. 4749.05 (B), actually provides that private investigators shall not operate in any county or municipality unless they notify the sheriff and police chief "within twelve hours of their arrival." It appears that appellant did notify police and attempted to enlist their aid within one hour before he proceeded to the residence where he believed the stolen property was located.

The April 4th article also stated that New Philadelphia police refused to assist Dupler because "they had to obtain a search warrant before thay could enter the apartment to conduct a search." In this same vein, it was reported on April 8th that, in recovering the stolen stereo without a search warrant, " 'Dupler in no way obstructed the administration of justice,' " according to the assistant prosecutor. While Dupler alleges that he was given consent to search, it is unclear as to whether such consent was given by an actual resident of the apartment.

Appellant has not contended that the contents of the April 4th and April 8th articles are libelous, and

none of the principals quoted therein have ever repudiated the statements attributed to them or complained about the accuracy of the reporting. Appellant's position is that Yockey's interpretation of the facts, as reported in the prior articles, is so contrary to "the law itself" as to indicate knowledge of falsity or reckless disregard of the truth by Yockey. Of course, the *New York Times* case refuted the idea that actual malice could be implied from the character and content of a publication. See, also, *Washington Post* v. *Keogh, supra,* at page 969. It is not sufficient for a libel plaintiff to show that an interpretation of facts is false; rather, he must prove with convincing clarity that defendant was aware of the high probability of falsity.

Appellant's contention that Yockey must have known he was falsely interpreting the notification satute is unconvincing. The clause of R. C. 4749.05(B) in question may be subject to differing interpretations. It is significant that appellant was not able to refute Yockey's deposition testimony that he relied completely on the prior news articles in writing his editorial. Yockey had no reason to doubt the accuracy of the statutory interpretations attributed to police in the initial article, nor the accuracy of the article itself. While a perusal of the Revised Code *may* have convinced Yockey that he was misinterpreting the statute. "[a]n investigatory failure alone***. without a high degree of awareness of probable falsity, may raise the issue of negligence but not the issue of 'actual malice.' " *Tagawa* v. *Maui Publishing Co.* (Hawaii 1968), 448 P. 2d 337, 340.[5]

Additionally, appellant's contention that Yockey was aware of the falsity of his editorial inference of an

[5]A different situation exists where the source of facts is inherently unreliable, such as an unverified anonymous phone call. Cf. *St. Amant* v. *Thompson* (1968), 390 U.S. 727, 732. In such a circumstance the writer could be deemed aware of the high probability of falsity.

illegal seizure by Dupler is also without merit. As a basis for his assertion that Yockey knew he was falsely accusing Dupler of making a illegal warrantless search, appellant points to a quote in the April 8th article by the assistant prosecutor that " 'Dupler in no way obstructed the administration of justice.' " An inference of actual malice cannot be drawn from this fact. The news articles stated that Dupler had made a warrantless search; however, the possibility of consent was missing from these stories. Yockey simply drew one of several permissible legal conclusions from these sketchy facts, *i.e.,* that the warrantless search was illegal. As observed in *Nader* v. *deToledano, supra,* at page 51, "[a]doption of a rational explication of an ambiguous document, even if erroneous, does not constitute clear and convincing evidence sufficient to support a judgment of publication with actual malice." It is readily apparent that the aim of the editorial was to criticize the prosecutor's office for its handling of this affair. Seen in this light, it can hardly be presumed that Yockey should accept the truth of an opposite legal conclusion espoused by the very same office he was criticizing.

Finally, appellant alleges that the editorial comment "if he is qualified as a licensed private investigator," was made with knowing falsity, because Yockey knew from the prior articles that Dupler was "acting as a private investigator," It is quite evident that this phrase is simply a rhetorical question, and as such, it can neither be true nor false. It merely raises the issue of whether, as a private investigator, Dupler violated the law.

Yockey's admissions at deposition that he now believes that three editorial comments directed toward Dupler are false is irrelevant. As stated in *Glover* v. *Herald Co.* (Mo. 1977), 549 S.W. 2d 858,861,

"actual malice is to be measured *at the time of publication****." (Emphasis added). *Accord, New York Times, supra,* at page 286. The fact that Yockey changed his opinion over one year after the editorial, when presented with additional facts, is not evidence of his state of mind when he wrote the editorial. *Cf. Herbert* v. *Lando, supra* (441 U. S. 153).

Having re-examined all the evidence before the trial court on the motion for summary judgment, and taking all reasonable inferences in the light most favorable to appellant, we find that a jury acting reasonably could not find actual malice with convincing clarity. Therefore, summary judgment should have been granted for appellee.[6]

IV.

While the foregoing conclusion resolves this cause this court also finds it necessary to review the Court of Appeals' finding that R. C. 2739.13 and 2739.14 are unconstitutional, as infringing upon freedom of expression. The trial court admitted evidence that, in August 1975, appellant submitted a retraction to the April 9th editorial to The Times-Reporter. Appellee published this statement, but not in the form or place specified by R. C. 2739.14.[7] Defense counsel objected to the admission of testimony concerning non-compliance with the retraction statutes, but the court allowed it as bearing on the mental state and attitude of Yockey. This was prejudicial error. As was held in

[6]In light of this conclusion, it is unnecessary for this court to review the Court of Appeals' determination that defendant's motions for directed verdict should also have been granted. However, we do note that there was no additional evidence adduced at trial from which a reasonable jury could find actual malice, at the time of publication, with convincing clarity.

[7]Specifically, appellee added "Editorial is rebutted" to the top of the statement and placed Dupler's name and address at the end, so that it appeared to be a letter to the editor, rather than an editorial retraction. Additionally, it was published in a less prominent place than was the original editorial.

New York Times, supra, at page 286, "failure to retract upon***demand***is***not adequate evidence of malice for constitutional purposes." It has not been demonstrated that Yockey's conduct, four months after the editorial, has any bearing on his state of mind at the time of publication.

However, the fact that evidence of non-compliance with the retraction statutes was erroneously admitted does not raise the question of the constitutionality of these provisions. Unlike the situation in *Miami Herald Publishing Co.* v. *Tornillo* (1974), 418 U. S. 241, appellant herein did not bring suit under these statutes, nor was there an attempt to criminally prosecute appellee for violation of these sections. The effect of R. C. 2739.13 and 2739.14 was totally irrelevant to the determination of this cause. The Court of Appeals had no occasion to pass on their constitutionality, and erred in so doing.

For the foregoing reasons, the judgment of the Court of Appeals is affirmed in part and reversed in part.

Judgment accordingly,

CELEBREZZE, C.J., P. BROWN, LOCHER, HOLMES and STILLMAN, JJ., concur.

STILLMAN, J., of the Eighth Appellate District, sitting for DOWD, J.

WILLIAM B. BROWN, J., concurring in this judgment. The majority opinion sustains the Court of Appeals' ruling that the trial court erred in denying defendant's motion for summary judgment, and in doing so, finds it unnecessary to review the Court of Appeals' alternative ruling that the trial court erred in denying defendant's motions for directed verdict. See fn. 6, *supra.*

If the majority opinion is correct in asserting that the same evidence on the issue of malice was before

the trial court at summary judgment as was before it after trial when it denied defendant's motions for directed verdict, see fn. 6, *supra,* our affirmance would be on firmer grounds if we ruled that the trial court erred in denying defendant's motions for directed verdict, and thus found it unnecessary to review the trial court's disposition upon motion for summary judgment.

We would be on firmer grounds because under the Civil Rules more evidence is needed to withstand a motion for directed verdict than is needed to withstand a motion for summary judgment.[8] Moreover, we would not thereby render trial on the merits nugatory by disposing of this cause on the basis of a pre-trial ruling.

Thus, I concur in the judgment because the trial record indicates that a directed verdict under Civ. R. 50(A)(4) was warranted. I find no need to review whether the trial court's denial of defendant's motion for summary judgment was correct, or whether the same material evidence was before the trial court when it denied defendant's motion for summary judgment as was before it after trial when it denied defendant's motions for directed verdict.

I am not necessarily indisposed toward a liberal approach to the granting of summary judgment,[9] nor am I necessarily indisposed toward the utilization of summary judgment for prophylactic purposes,

[8]The same quantum of evidence can require that a motion for summary judgment be *denied* under Civ. R. 56(C) because there exists "a genuine issue as to*** [a] material fact," and that a motion for directed verdict under Civ. R. 50(A)(4) be *granted* because "reasonable minds could come to but one conclusion upon the evidence."

[9]Some judges and commentators would grant summary judgment whenever a verdict would be directed on the record the parties have actually presented; while others would deny summary judgment whenever the record presented indicates the likelihood that new or different evidence might turn up at trial. See, *e.g. Arnstein* v. *Porter* (C.A. 2, 1946), 154 F. 2d 464; Wright, Federal Courts (3 Ed.) 495-496, Section 99.

especially where First Amendment rights are implicated.[10] However, I simply do not think it necessary or prudent, especially by way of syllabus, for us to reach these larger issues here, particularly since this cause was not argued as such.[11]

[10]Instead of permitting a defamation plaintiff to withstand a defendant's motion for summary judgment if a genuine issue as a material fact *(i.e., malice)* exists as is usually the case under Civ. R. 56(C), some courts, as does the majority herein, require such a plaintiff to pass muster under a variant of the more restrictive directed verdict standard. See Civ. R. 50(A)(4), at fn. 8, *supra;* syllabus, *supra.* Apparently, courts employ these more restrictive standards to reduce the frequency with which spurious defamation actions are maintained.

[11]Even if the trial court did err in denying defendant's motion for summary judgment (because plaintiff's proof at summary judgment failed), the majority should have first considered whether this error was rendered harmless by the evidence adduced at trial. There is no doubt that the trial court's denial of defendant's motion for summary judgment was reviewable upon defendant's appeal from the ensuing adverse final judgment. *Balson* v. *Dodds* (1980), 62 Ohio St. 2d 287, paragraph one of the syllabus. *Balson* v. *Dodds,* however, leaves open the issue of the application of the harmless error doctrine to denials of summary judgment motions. See, generally, Civ. R. 61; 7 Moore's Federal Practice. Chapter 61; 5A Corpus Juris Secundum 115, Appeal and Error, Section 1757.

The trial court's denial of plaintiff's motion for summary judgment in *Balson* v. *Dodds, supra,* could not have been harmless because this denial was predicated upon a construction of Civ. R. 36 which permitted defendant to avoid the legal conclusiveness of his failure to file timely answers to plaintiff's Requests for Admissions. Thus, the above legal conclusiveness of these Civ. R. 36 admissions (which would have obtained if summary judgment had instead been granted) would have required an appellate court to ignore the evidence adduced at trial even if this evidence totally conflicted with these Civ. R. 36 admissions.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

JERRY DUPLER,
Petitioner,

v.

MANSFIELD JOURNAL CO.,
Respondent.

APPENDIX "B"
OPINION OF THE COURT OF APPEALS
FOR TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE COURT OF APPEALS
FOR TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT
Filed December 20, 1979

JERRY DUPLER,
Plaintiff-Appellee

vs

MANSFIELD JOURNAL COMPANY, INC.
Defendant-Appellant

JUDGES:
Hon. Norman J. Putman, P.J.
Hon. Leland Rutherford, J.
Hon. David D. Dowd, Jr.,J.

OPINION
CASE NO. CA-1367

PUTMAN, P.J.

This is an appeal from a $149,000.00 libel judgment in favor of a candidate for public office against a newspaper.

We reverse and enter a final judgment for the defendant because there is no evidence that the person who wrote the editorial in question knew at the time of publication that it was false or in fact entertained serious doubts as to its truth and published it while entertaining such doubts.

The items alleged to be false were opinions of the requirements of the law in two fact situations rather than the facts of the situations themselves.

First, whether or not an Ohio statute required a private investigator to report his presence and length of stay twelve hours *in advance* of his arrival, and second, whether that private investigator could seize personal property in a specific situation without a search warrant.

In the case of the asserted advance report requirement, the claim of absence of "knowledge of falsity" is buttressed by the imprecise language of the statute and the fact that the editorial was based upon a news story in which the Chief of Police of the municipality in question expressed the same opinion as the editorial. Having made that preliminary statement, we move to a detailed analysis of the case.

Plaintiff-appellee, Dupler, claimed that defendant-appellant, Mansfield Journal Company, Inc., libeled him in an editorial (Appendix "A") published April 9, 1975, by its subsidiary newspaper, The Times Reporter, located in New Philadelphia. The editorial commented upon the county prosecutor's decision not to prosecute the plaintiff for his alleged

misconduct as a private investigator in recovering stolen property for a client. The editorial was written by the Editor, Harry Yockey, who claimed it was based solely upon two preceding news stories published in the newspaper, one on April 4, 1975, (Appendix "B) and another article which appeared on April 8, 1975, (Appendix "C"). These two news articles reported an inquiry by the New Philadelphia Police and the Tuscarawas County Prosecutor into plaintiff's conduct as a private investigator.

Plaintiff complains primarily of defendant's alleged misinterpretation of R.C. 4749.05 relating to the responsibilities of a private investigator.[1] That Code section provides:

> "(B) No private investigator nor any of his employees shall engage in the business of private investigation unless, within twelve hours of their arrival, they report their presence and length of stay to the sheriff and police chief of any county or municipality in which they operate."

After conference with the Police Chief and a perusal of the Code section, reporter Simmelink wrote, in the second paragraph of the article of April 4th:

> "According to police, Dupler, a Dover mayoral candidate, violated a section of Ohio Revised Code which states a private investigator must give a sheriff and police chief 12 hours advance notice of his involvement in a case."

Continuing, at the 15th paragraph of the same article, the reporter says:

> "The Chief said that the unorthodox

[1]This alleged misinterpretation, although apparently never authoritatively adjudicated, was assumed by all participants in trial and appeal. We are not bound by it in other cases.

involvement of Dupler and Dinolfo have 'screwed up' the investigation, and he is not sure if enough evidence can be gathered now to file charges."

Chief Locker admitted discussing the matter with the reporter, and making this latter statement. (R. 198-199).

The reference to the statute was continued in the article of April 8th written by Reporter Mizer at the 12th paragraph:

"Shew said the prosecutor's office won't charge Dupler with violating Ohio Law which states a private investigator must give a sheriff and police chief 12 hours advance notice of his involvement in the case, Shew said. 'We're not concerned with Dupler not notifying the police."

Again, at the 13th paragraph:

"Prosecutor Ron Collins, who was not at the meeting, emphasized Shew's comments by stating that if such a violation did occur, he would not prosecute it because of 'a lack of criminal intent'."

Yockey in the editorial written on the 8th and published on the 9th said at the 3rd paragraph:

"Private investigators, under Ohio Law, must inform authorities 12 hours in advance of participation in a case."

and again in the 5th paragraph:

"It seems to us that Dupler, if he is qualified as a licensed private investigator, ignored Ohio law twice - by not giving authorities the proper notification and then by making a seizure without a search warrant."

Plaintiff does not claim that he was libeled in the news stories but only by statements contained in the editorial.

The editor testified that he conducted no investigation of the facts other than a question to the managing editor as to the respective political parties of the plaintiff and the prosecutor. He claimed that he assumed the truth of the information in the two news articles in writing and publishing the editorial. This claim was neither contested nor contradicted.

Plaintiff, at the time of his activities as a private investigator, and at the time of the publication of the editorial, was an elected Councilman of the City of Dover, a municipal corporation located in Tuscarawas County, and an announced candidate for Mayor of that City, having filed his petitions for election with the county election authorities. He was a former fireman in the City of Dover, and a former Deputy Sheriff in Tuscarawas County. At the time of the publication of the editorial, he was working as a licensed private investigator for Cloverleaf Security and was also a route salesman for a potato chip company.

On March 25, 1975, Plaintiff, having first been contacted as a Councilman by a constituent, and later acting for him in his capacity as a private investigator, attempted the recovery of stereo equipment for his client from a private residence in the City of New Philadelphia also in Tuscarawas County. On the day of the incident he had conferred with Dover Police about the progress of their investigation and, one hour prior to going to the residence, unsuccessfully attempted to enlist the aid of the New Philadelphia City Police Department. Plaintiff and his client then went to the private residence and requested permission to enter and search. The client was given permission to enter. After the arrival of the New Philadelphia Police, who had been summoned by a third party, plaintiff and the client removed certain stereo equipment. These events were witnessed by one Will Boland.

Thereafter, New Philadelphia Police Chief Locker conferred with the County Prosecutor's Office regarding the propriety of the activities of the plaintiff as a private investigator and a meeting was held between the prosecutor, the police chief, plaintiff and his representatives to determine what had occurred and what, if any, legal charges would be brought against plaintiff. The prosecutor's office dropped the matter and announced that no charges would be filed.

That story was first picked up by the Dover City Hall Reporter, Farrell, who enlisted the aid of Reporter Simmelink in developing the story of Friday, April 4th (Appendix "B"). Simmelink interviewed Prosecutor Ron Collins and Chief Locker before writing the story and the Chief referred to the provisions of R.C. 4749.05 in the interview. Simmelink reported Chief Locker's interpretation of the statute, the interpretation adopted in the editorial. In the story of April 4th, plaintiff was referred to as "a Dover Councilman at Large", a "Private Investigator" and "a Dover Mayoral Candidate".

The meeting of April 7th, involving the prosecutor, police and plaintiff, was covered by Reporter Mizer who wrote the second news story on Tuesday, April 8th, 1975 (Appendix "C"). In preparing to write the story, Mizer talked to Assistant Prosecutor Shew, Attorney Barnhouse representing plaintiff, Chief Locker and Plaintiff Dupler, who did not respond to questions. Mizer also contacted Prosecutor Collins to verify certain statements attributed to him and conversed with plaintiff's client Dinolfo, before writing the story.

None of the persons quoted in the above articles ever repudiated any of the statements attributed to them, or complained about the accuracy of reporting. Editor Yockey read the article of April 4th (Appendix "B"), the article of April 8th (Appendix "C"), and, on

that same day, wrote the editorial in question. Other than confirming the fact that both plaintiff and the prosecutor were Democrats, the editor made no further investigation or research regarding the facts.

Nearly four months passed.

Then for the first time, the defendant newspaper received a letter dated August 7, 1975, requesting a retraction. On August 12, 1975, the defendant published that letter.[2] Defendant had received no other contact or communication from plaintiff regarding the article prior to the request for a retraction.

The trial court, in its Opinion overruling the defendant's motion for summary judgment, indicated that reasonable minds could conclude that the use of the word "us" in the editorial could be construed to mean collectively, the editor, the newspaper reporters and all members of the editorial staff, and that any facts known to any of them could be attributed to Yockey, the writer of the editorial. This erroneous view evidently explains his ruling and the fact that a trial ensued.

Absent "clear and convincing" evidence that Yockey did have this "knowledge" - at the time he wrote the editorial, or a "conscious awareness" of the "probable falsity" of the statements, the defendant is not liable. *New York Times v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d. 686 (1964).*

It is uncontroverted that plaintiff was a public official and his counsel conceded in oral argument on appeal, that the standard applicable to plaintiff's claim is that first enunciated in *New York Times v. Sullivan, supra.*

While the trial court was considering the motion for summary judgment, the U.S. Supreme Court denied

[2]Failure to publish a retraction is not evidence of malice. *New York Times v. Sullivan, 276 U.S. 254 at page 287.*

certiorari in four separate cases involving public officials' libel suits. *Glover v. The Herald Company dba Glove-Democrate Publishing Co., 549 S.W. 2d. 858 (1977), (Missouri Sup. Ct.), Cert. denied, 434 U.S. 965, 54 L. Ed. 2d. 451 (1977); Rinaldi v. Holt, Rinehart & Winston, Inc., 397 N.Y.S. 2d. 943 (1977), (Court of Appeals of New York), Cert. denied 434 U.S. 969, 54 L. Ed. 2d. 456 (1977); Fadell v. Minneapolis Star & Tribune Company, Inc., 557 F. 2d. 107 (1977), (U.S. Ct. App., 7th Cir.), Cert. denied 434 U.S. 966, 54 L. Ed. 2d. 452 (1977); Edwards, Ph.D. et al. v. National Audubon Soc., Inc., and the N.Y. Times Company, 556 F. 2d. 113 (1977), (U.S. Ct. of App., 2nd Cir.), Cert. denied 434 U.S. 1002, 54 L. Ed. 2d 498 (1977).*

Glover, supra, appears to confront Dupler's claim head-on. At page 861, the *Glover* court said:

"(2) Respondent misapprehends the quality of knowledge required by this standard *(New York Times)* to overcome the constitutional protection. As a public official, which there can be no doubt she was, respondent's case is bottomed upon the presumption that Wilson knew that the story as published was false because he had originally received the correct information from reporter Canfield, and therefore, respondent maintains she was satisfied the New York Times standard by establishing actual malice. Although the error in respondent's interpretation of actual malice is demonstrated by reference to *New York Times Co. v. Sullivan* alone, this conclusion is further compelled by more recent United States Supreme Court cases that refine the standard articulated in *New York Times Co.*

(3) By the language of *New York Times Co.*, (1) actual malice is to be measured at the time of publication, (2) the state of mind necessary to establish actual malice requires that this knowledge 'be brought home to the persons . . . . having

responsibility for the publication', and (3) negligence is 'constitutionally insufficient to show the recklessness that is required for a finding of actual malice.' *New York Times Co., supra* at 286-88, 84 S. Ct. at 730."

The *Glover* Court went on to cite the "high degree of awareness of probable falsity" test announced in *Garrison v. Louisiana, (1964) 389 U.S. 64, 74, 85 S. Ct. 209, 216, 13 L.Ed. 125.*

In his opinion, the trial court interpreted "us" in the editorial to mean that the entire editorial staff was responsible for its content and any knowledge any of them might have had, if further evidence were to develop, would be attributed to the writer of the editorial as his own knowledge, and therefore the matter ought to proceed to the jury for the development of further evidence.

This view was expressly rejected in *New York Times v. Sullivan, supra.* There in fact New York Times' files did contain the true facts, and had they been checked, the falsity may have been discovered. At *376 U.S. 287, 288, the New York Times Court* said:

> "Finally, there is evidence that the Times published the advertisement without checking its accuracy against the news stories in the Times' own files. The mere presence of the stories in the files does not, of course, establish that the Times 'knew' the advertisement was false, since the state of mind required for actual malice would have to be brought home to the persons in the Times' organizations having responsibility for the publication of the advertisement. ....We think the evidence against the Times supports at most a finding of negligence in failing to discover the misstatements, and is constitutionally insufficient to show the

recklessness that is required for a finding of actual malice."

The only issue to be determined in this case is the state of mind, and knowledge, Editor Yockey had at the time of the writing and publishing of the editorial.

The U.S. Supreme Court, in the many decisions following *New York Times v. Sullivan, supra,* has pointed out that the trial court is better qualified than a jury to analyze the evidence to determine whether it meets the "clear and convincing" quality required. See *New York Times v. Sullivan, supra., at 286; St. Amant v. Thompson (1968) 390 U.S. 727 at 731, 88 S. Ct. 1323; 20 L.Ed.2d. 262; and Beckley v. Hanks (1967) 389 U.S. 81 at 83; 88 S. Ct. 197, 19 L.Ed.2d. 248.* The burden is on the plaintiff to prove, in effect, a "calculated falsehood", *Curtis v. Butts (1967) 388 U.S. 130 at 153, 87 S. Ct. 1975, 18 L.Ed.2d. 1094.* Defendant is not required to have even "a reasonable belief" in the truth of the publication. *Garrison v. Louisiana, supra., 379 U.S., 64 at 78 and 79.*

Plaintiff's burden is to show that the defendant's editor wrote and published the editorial, with a "high degree of awareness" at the time of the publication, that certain of the statements were false, and having such knowledge, published the statements in reckless disregard of whether they were true or false. As pointed out by appellant, hindsight is not the issue. Whether a reasonably prudent person would have published or would have investigated further before publishing is not the issue. The Supreme Court in *St. Amant v. Thompson, 390 U.S. 727 at 730, 20 L. Ed.2d. 262, 88 S. Ct. 1323 (1968)* said:

> " 'Reckless disregard', it is true, cannot be fully encompassed in one infallible definition. ...our cases, however, have furnished meaningful guidance for the further definition of a reckless publication. In *New*

York Times, supra., the Plaintiff did not satisfy his burden because the record failed to show that the publisher was aware of the likelihood that he was circulating false information. In *Garrison v. Louisiana, (supra.)* also decided before the decision of the Louisiana Supreme Court in this case, the opinion emphasized the necessity for showing that a false publication was made with a 'high degree of awareness of ...probable falsity'. 379 U.S., at 74, 13 L. Ed. 2d. at 133. Mr. Justice Harlan's opinion in *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 153, 18 L. Ed. 2d. 1094, 1110, 87 S. Ct. 1975 (1967), stated that evidence of either deliberate falsification or reckless publication 'despite the publisher's awareness of probable falsity' was essential to recovery by public officials in defamation actions. These cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the *Defendant in fact entertained serious doubts as to the truth of his publication.* Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." (italics added)

Editor Yockey's state of mind, his knowledge, at the time of publication is the sole issue. Plaintiff had the right to inquire of Editor Yockey as to his state of mind at the time of publication. Subsequent to the case at bar, it has been declared that he had the obligation to do so. *Herbert v. Lando, ____ U.S. ____, 60 L.Ed.2d. 115, 99 S. Ct. - (April 18, 1979).* In *Herbert,*

Justice White at 60 L.Ed.2d. at page 122, speaking for the Court, reaffirmed the Court's adherence to *New York Times v. Sullivan, supra. and Curtis Publishing Co. v. Butts, supra:*

> "(2a, 3) Although his cause of action arose under New York State defamation law, Herbert conceded that because he was a 'public figure' the First and Fourteenth Amendments precluded recovery absent proof that respondents had published a damaging falsehood "with 'actual malice' - that is, with knowledge that it was false or with reckless disregard of whether it was false or not". This was the holding of the *New York Times v. Sullivan,* 376 U.S. 254, 280, 11 L.Ed.2d. 686, 84 S. Ct. 710, 95 ALR 2d. 1412 (1964), with respect to alleged libels of public officials, and extended to 'public figures' by *Curtis Publishing Co., v. Butts,* 388 U.S. 130, 18 L.Ed.2d. 1094, 87 S. Ct. 1975 (1967). Under this rule, absent knowing falsehood, liability requires proof of reckless disregard for truth, that is, that the defendant 'in fact entertained serious doubts as to the truth of his publication.' *St. Amant v. Thompson,* 390 U.S. 727, 731, 20 L.Ed.2d. 262, 88 St. Ct. 1323 (1968). Such 'subjective awareness of probable falsity', *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 335 n 6 41 L.Ed.2d. 789, 94 S. Ct. 2997 (1974), may be found if 'there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports,' *St. Amant v. Thompson, supra.,* at 732, 20 L.Ed.2d. 262, 88 S. Ct. 1323."

Plaintiff's inquiry as to Yockey's "state of mind" is contained in his deposition filed in support of the motion for summary judgment and in trial cross-

examination of Yockey and defendant's direct examination of him. In reading this testimony, it is apparent that plaintiff's counsel was intent on demonstrating to the jury that if the editor would have been more careful in reading the news articles, he might have made different statements in writing the editorial. Questioning the editor specifically about the statement, "It seems to us that Dupler, if he is qualified as a licensed private investigator ...", (not in and of itself a libelous statement), plaintiff's counsel put to Editor Yockey the following:

R. 111

> "Tripodi — Q. - So what, in fact, you did then, Mr. Yockey, was totally disregard whatever the truth was and printed what you wanted to print?
>
> Yockey — A. - I would have to say yes."

Appellee seizes upon this exchange and claims it is an admission that Yockey intentionally printed what he knew at the time was a falsehood. This construction of that answer is not supported by a careful reading of the record. It is clear from the context that Yockey's answer is merely an acknowledgement that *now* he is persuaded that he held a legally incorrect view of the requirement of registration and need for a search warrant. For the foregoing reasons, the first and second assignments of error are sustained. The evidence does not support the judgment.

In its third assignment of error, the appellant claims:

> "The verdict and judgment deprived this appellant of its constitutional right to freely express its opinion as fair comment, there being no such thing as a false idea."

Here appellant "zeros in" on the concept that an opinion of statutory interpretation is not a matter of fact actionable in libel.

It is established, as a matter of constitutional law by the First Amendment, that a statement of opinion cannot be defamatory. *Orr v. Argus Press, U.S. Court of Appeals, 6th Cir. 586 F.2d. 1108 (October 19, 1978).*

The Supreme Court of the United States has said:

> "Under the First Amendment there is no such thing as a false idea." *Gertz v. Welch,* 418 U.S. 323, 339-340, 41 L.Ed.2d. 789, 94 S.Ct. 2997 (1974)."

Erroneous opinions are inevitably put forward in free debate, but even the erroneous opinion must be protected so that debate on public issues may remain robust and unfettered and concerned individuals may have the necessary freedom to speak their conscience. *New York Times, supra., pp. 271-272.*

Consequently, mere expressions of opinion or severe criticism are not libelous, even though it adversely reflects on the fitness of an individual. *Rotchner v. Castillo-Puche, 551 F. 2d. 910, 404 F. Supp. 1041 (1975); Rinaldi v. Rinehart & Winston, Inc., supra.*

In our view, the editorial in issue does not rise above an expression of opinion, and as such, it is protected as a privileged comment.

The editorial was published under a bold face heading "Opinion". Secondly, the phrase, "It seems to us" preceding the sixth paragraph, of which plaintiff complains, clearly labels what follows as the editorial opinion of the newspaper.

In its fourth assignment of error, the appellant complains that:

> "The court erred in permitting questions on Ohio Revised Code sections 2739.13 and 2739.14, and in charging the jury on section 2713.13 relating to plaintiff's right to reply to defendant's editorial, because the statutes are unconstitutional."

We agree.

The trial court permitted testimony concerning R.C. 2739.13 and R.C. 2739.14, a photocopy of which was marked plaintiff's exhibit "1" and witnesses were questioned regarding the exhibit. The court did not admit exhibit "1" but did charge the jury with respect to R.C. 2739.13. The two statutes purport to require that defendant publish plaintiff's reply to the editorial, Exhibit "D", as a "Retraction". The defendant objected to testimony relating to these statutes, claiming that they were unconstitutional and his objection was overruled. We hold this was error.

The Supreme Court of the United States has declared such statutes to be unconstitutional in *Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 41 L.Ed.2d. 730, 94 S. Ct. 2831 (1974),* decided the same day as *Gertz, supra.* The Florida state statute in *Miami Herald,* (quoted in a footnote, 41 L.Ed.2d. at 733, 734), granted any political candidate a right to equal space, free of charge, in a newspaper to reply to newspaper criticism of the candidate's personal character or his performance in office. The statute indicated that the reply must appear in as conspicuous a place, and in the same kind of type as the charges which prompted the reply. The failure of the newspaper to comply with the statute constituted a misdemeanor. This statute is similar to R.C. 2739.13, R.C. 2739.14 and R.C. 2739.16.

Chief Justice Burger, writing for an unanimous court, held that the statute operated as a "command in the same sense as a statute or regulation forbidding appellant to publish specified matter", 418 U.S. at page 256, and therefore, "fails to clear the barriers of the First Amendment because of the intrusion into the function of editors". (also at page 256)

Continuing, Justice Burger said, at 418 U.S. 257:

> "Faced with the penalties that would accrue to any newspaper that published news or

commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced. Government - enforced right of access inescapably 'dampens the vigor and limits the variety of public debate'. *New York Times Co. v. Sullivan* (supra.). The Court in *Mills v. Alabama,* 384 U.S. 214, 218, 16 L.Ed.2d. 484, 86 S. Ct. 1434 (1966), stated that

> 'there is practically universal agreement that a major purpose of (the first) Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates.....'

The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials - whether fair or unfair - constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with the First Amendment guarantees of a free press as they have evolved to this time. Accordingly, the judgment of the Supreme Court of Florida is reversed."

Mr. Justice White, concurring in *Miami Herald, supra, (418 U.S. at page 259),* said:

"The Court today holds that the First Amendment bars a state from requiring a newspaper to print the reply of a candidate for public office whose personal character

has been criticized by that newspaper's editorials. According to our accepted jurisprudence, the First Amendment erects a virtually insurmountable barrier between government and the print media so far as government tampering, in advance of publication, (with) news and editorial content is concerned. *New York Times Co.* v. United States, 403 U.S. 713, 29 L.Ed.2d. 822, 91 S. Ct. 2140 (1971). A newspaper or magazine is not a public utility subject to 'reasonable' governmental regulation in matters affecting the exercise of journalistic judgment as to what shall be printed. *Mills v. Alabama, supra.* We have learned, and continue to learn from what we view as the unhappy experiences of other nations where government has been allowed to meddle in the internal affairs of newspapers. ..."

Appellant argues, correctly we think, that in the case sub judice the trial court, by permitting extensive questioning of defendant's editor as to whether or not he complied *exactly* with plaintiff's demand that he print his "Reply" to the submitted editorial and the labored analysis in testimony as to whether the reply was printed *exactly as submitted,* or whether there had been *slight deviation,* served only to confuse the jury as to what was the true responsibility of the defendant. If the jury decided that defendant did not comply *exactly* with the reply statute they could reasonably have inferred this satisfied the requirement of "actual malice."

Our decision precludes the necessity of ruling on assignment of error five through seven inclusive.

The first four assignments of error are sustained, the judgment of the Court of Common Pleas of Tuscarawas County is reversed and a final judgment

in favor of the Defendant, Mansfield Journal Company Inc. and against the Plaintiff, Jerry Dupler, is entered.

Dowd, J. concurs.
Rutherford, J. concurs
in the judgment.

RUTHERFORD, J., concurring.

Although I find the editorial comment, on April 9, upon which Plaintiff's claim is based not to be an expression of opinion, but an erroneous statement of fact with respect to applicable law, I nevertheless concur in the judgment rendered by the majority opinion of this court.

Harry Yockey, author of the editorial, upon being called upon cross-examination, testified in answer to a leading question asked by Plaintiff's counsel, as follows:

(TR 111)

"Q. So what, in fact, you did then, Mr. Yockey, was totally disregard whatever the truth was and printed what you wanted to print?

A. I would have to say yes."

When Mr. Yockey testified later on direct examination, in explanation of his answer previously given, he stated:

(TR 393 - 395)

"Q. Having read the article of April 4, Harry, *written by Tom Simmelink,* which is Exhibit 'G', I'll ask you whether or not you formed a belief as to whether the facts in that article were true or false?

A. Yes.

Q. All right, Sir. What was that belief?

A. That they were true.

Q. What was the basis for your belief?

A. Well, Simmelink is a qualified reporter, --

qualified writer.

Q. Now Harry, I'll ask you, having read the article of April 8, written by Joe Mizer, which is Exhibit 'G', -- Exhibit 'F' prior to your writing the editorial of April 9, I'll ask you whether or not you formed a belief as to whether the facts in that article were true or false?

A. Yes.

Q. And I'll ask you what that belief was?

A. That the facts were true.

Q. And did you have a basis for that belief?

A. The same basis as I had for this one. This one was written by Joe Mizer, a very trustworthy, qualified reporter.

Q. All right, Sir. Now Harry, having written your article of April 9, 1975, your editorial of April 9, 1975 which is Exhibit 'A' and having sent that to the composing room, I'll ask you whether or not at the time you wrote it, and published it, whether you had a belief as to whether the facts in that editorial were true or false?

A. That they were true.

Q. You had a belief. Is that correct?

A. Yes.

Q. What was that belief?

A. That the facts were as they were stated in the two articles.

Q. Fine. Having prepared your editorial of April 9 written it and sent it to the composing room for publishing, I'll ask you whether or not you had a belief at that time, as to whether the facts in that editorial were true or false?

A. Yes.

Q. What was that belief?

A. That they were true." (Emphasis added)

James Locker, Chief of Police, New Philadelphia,

Ohio, when called on direct examination by the Plaintiff with respect to the article printed in the paper, written by Tom Simmelink, prior to the editorial of Harry Yockey, testified:

(TR 189)

"Q. Now, I'll hand you what has been identified as Plaintiff's Exhibit 'B', a newspaper article that was printed on April 4, 1975 and ask you to examine that.

A. Okay. I read this article in this paper, here.

Q. Did you verbally give that information to Tom Simmelink, the Times Reporter reporter?

A. Yes, I would say if I gave him that information, he got a lot of it right out of the case report. - - - "

The jury was instructed by the court that in addition to an award for compensatory damages, that if they found actual damages, they could also consider punitive damages which may be awarded only where a party with actual malice injures another, with the amount of punitive damages resting within the sound judgment of the jury and determined from all the evidence in the case. Further, that if they made an award of punitive damages they could include in the award for actual damages a reasonable amount for attorney fees of counsel employed by the Plaintiff in the prosecution of the action.

The jury rendered a verdict, which with respect to the awards made, reads:

"We, the Jury, - - - find the issues in this case in favor of the Plaintiff,

JERRY DUPLER

and assess the amount due the Plaintiff from the Defendant, the said

MANSFIELD JOURNAL CO., INC.

at the sum of ($34,000.00) Thirty Four Thousand Dollars.

We, do further find punitive damages for the Plaintiff in the amount of $100,000.00, Dollars and, we do further find Attorney fees for the Plaintiff in the amount of $15,000.00 Dollars. - - - "

I construe the holding of the United States Supreme Court in New York Times v. Sullivan, 376 U.S. 254, 11 L Ed 2d 686, 84 Supreme Ct. 10, and as further reiterated in Herbert v. Lando, 60 L Ed 2d 115, to incompass within "actual malice" the publication of erroneous information known to be false or probably false, which is held not to be protected under First Amendment freedom of speech or of the press, irrespective of whether accompanied by hostility or ill will.

In the instant case I find in the record no evidence to support a finding of hostility or ill will in the publication of the April 9 editorial and therefore no "express malice" which in my opinion is necessary to support an award of punitive damages and attorney fees in conjunction therewith rendering that portion of the jury verdict contrary to law.

Returning to the issue of "actual malice" and the jury award of $34,000.00 damages, upon consideration of the record, including the testimony herein set forth, I find insufficient evidence as a matter of law to sustain the burden of proof by Plaintiff that Harry Yockey knew at the time that there was erroneous information contained in the editorial which was known to be false or which he knew or had reason to believe was probably false, or even might be false.

For the reasons set forth, I concur in the sustaining of the Appellant's first four assignments of error, in the reversal of the judgment of the Common Pleas Court

of Tuscarawas County, Ohio appealed from, and in the final judgment of this court in favor of the Defendant Mansfield Journal Co., Inc. and against the Plaintiff Jerry Dupler.

LELAND RUTHERFORD, Judge

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

JERRY DUPLER,
Petitioner,

v.

MANSFIELD JOURNAL CO.,
Respondent.

APPENDIX "C"
JUDGMENT ENTRY AND OPINION OF TUSCARAWAS COUNTY, OHIO COURT OF COMMON PLEAS RELATIVE TO DEFENDANT'S (RESPONDENT'S) MOTION FOR SUMMARY JUDGMENT.

STATE OF OHIO, TUSCARAWAS COUNTY, SS:
IN THE COURT OF COMMON PLEAS
Filed April 17, 1978

JERRY DUPLER,
Plaintiff,

v

MANSFIELD JOURNAL COMPANY, INC.
Defendant.

CASE NO. 46762

JUDGMENT ENTRY

This cause came on to be heard before this Court upon the Defendant's motion for a summary judgment. The matter was submitted to the Court on the pleadings, answers to interrogatories, affidavits, depositions with exhibits attached and the same was argued by counsel for both parties.

Upon due consideration thereof, the Court finds the motion for summary judgment not well taken and should therefore be overruled for the reasons more fully disclosed in the Court's opinion filed in this cause on March 10th, 1978.

It is therefore ORDERED, ADJUDGED and DECREED that the motion of the Defendant for summary judgment be, and the same is hereby overruled and this matter is continued for further proceedings according to law.

JUDGE, COURT OF COMMON PLEAS.

APPROVED BY:
Joseph I. Tripodi
James R. Barnhouse,
ATTORNEYS FOR PLAINTIFF.

Richard Hanhart,
Attorney for Defendant.

STATE OF OHIO, TUSCARAWAS COUNTY, SS:
IN THE COURT OF COMMON PLEAS

JERRY DUPLER,
Plaintiff,

vs

MANSFIELD JOURNAL COMPANY, INC.,
Defendant.

CASE NO. 46762

OPINION

This matter comes before this Court on a motion for summary judgment. The matter is submitted on

pleadings, answers to interrogatories, affidavits, depositions with exhibits attached.

Reasonable minds could conclude by clear and convincing proof the following facts: During the month of March and April, 1975, Jerry Dupler was a licensed private investigator operating and employed by Cloverleaf Security and that he assumed to do some private investigative work for Brad Dinolfo; said employment being to recover a stereo and other personal property stolen from the said Brad Dinolfo on or about the 21st or 22nd of March, 1975; that he proceeded in a lawful manner with legal and proper notice to the police of the City of New Philadelphia and with a written consent of the occupant of the property of 718 East High Street, New Philadelphia; entered an apartment and removed the said stolen property and turned the same over to the New Philadelphia Police. The Defendant, the Mansfield Journal, published newspaper articles on April 4, and April 8,1975, and an editorial about the Plaintiff on April 9, 1975.

For the purposes of this opinion, it is only necessary to follow one thread of falsehood established by clear and convincing evidence and published with actual malice by the publisher.

On April 8, 1975, there was published an article in the Times-Reporter, "(Dupler is a licensed private investigator with Cloverleaf Security and has done work for Cloverleaf for the past year and a half, according to Earl (Lefty) Doriche, owner.)" The editorial published by the Times-Reporter on April 9, "It seems to us that Dupler, if he is qualified as a licensed private investigator, ignored Ohio law twice -- by not giving authorities the proper notification and then by making a seizure without a search warrant." "Private investigators, under Ohio law, must inform authorities 12 hours in advance of participation in a

case." The Editor of the Times-Reporter was Harry Yockey, and the Managing Editor was James E. Davis at all times involved. Harry Yockey wrote the editorial and James E. Davis, the Managing Editor, read it.

Refer to deposition of James E. Davis

Page 15 - Line 6:

"A. I read the Editorial before it went in."

Page 18, Line 10:

Q. What other sources does, or did Harry Yockey have on April - in the month of April, 1975 that would culminate in an editorial?

A. As far as I know that would be all; I have no idea if he used any other sources."

The words "it seems to us" equal the Defendant, the Times-Reporter, not only Yockey and Davis, but the rest of the editorial staff, and in particular, Yockey, Davis, Farrell, Simmerlink, and Mizer. Mr. Yockey had read the newspaper.

See deposition of James E. Davis

Page 30, line 13-17:

"Q. In your earlier testimony I believe you stated that you presented this information to Mr. Yockey?

A. No, I didn't say that. I said the information we talked about with Mr. Yockey, was strictly on the political connection, that was it; the article itself, he had read the newspaper."

On acting within the scope of their authority,

See Deposition of James E. Davis

Page 51 - Line 12-21:

"Q. And Mr. Davis, as far as you know, if your reporters had covered the story as you had requested them to do and they did their job, they would have this knowledge, would they have not?

A. Correct, in the one story they did attempt to get ahold of Jerry Dupler and according to

the story they were unable to get ahold of him.

Q. But if they had done their jobs as instructed, they would have had the information submitted to you on Plaintiff's Exhibit B, would they not?"

Page 52 - Line 4-13:

"Q. And these three gentlemen are still employed: Simmerlink, Mizer and. . .

A. Farrell.

Q. Correct.

Q. Farrell with the newspaper?

A. Correct.

Q. And their jobs are subject to whose authority control at the present date?

A. Mine.

Q. And that is Dick Farrell, Tom Simmerlink and Joseph Mizer?

A. Correct."

The editorial contained the words "it seems to us", which means the editorial staff of the Times-Reporter.

See deposition of James E. Davis, page 25, line 21-25, and page 26, line 1-2:

"A. I would assume - no, Mr. Yockey could tell you. I would say it would be the newspaper.

Q. "us" refers to the Times Reporter Company?

A. (Shaking head yes).

Q. It's your testimony that "us" does not refer to yourself and Mr. Yockey?

A. Correct."

The foregoing is only one thread -- one of many threads of evidence leading to facts from which under the law, a determination may be made relative to actual malice.

"I, Jerry Dupler, being first duly sworn, state

as follows:

That I furnished the report in writing to the New Philadelphia Police Department at 11:55 P.M. on March 25th, 1975 concerning certain incidents that occurred that evening and gave the original to Traffic Officer, Michael D. Haney, of the New Philadelphia Police Department for their file. I was present when Brad Donolfo also gave a written report to the New Philadelphia Police Department and I was also present when the original copy of the verification of the voluntary consent to search was put in writing by Will Bolen.

The originals of these three written documents were given to the New Philadelphia Police Department and placed in their file and they were available at all times for reporters of the Defendant, Mansfield Journal Company, Inc. (the Times-Reporter).

I also have copies of all three instruments and a copy of the same is attached hereto and made a part hereof as if fully rewritten herein.

I further state that this is some of the material that reporters of the Defendant did see and/or have access to prior to the writing of the editorial by the Defendant and which is referred to in No. 32 of the Interrogatories that I answered and which were filed in this cause on June 23rd, 1976.

I state that the Defendant, Mansfield Journal Company, Inc. (the Times-Reporter), including the Editorial Staff and Harry Yockey, had knowledge that the statements being printed in the editorial were false. They not only had before them the reports - copies attached hereto - they had personal interview statements from Brad Dinolfo; they had

interview statements from the Dover and New Philadelphia Police Departments and knew that I had contacted both police departments immediately upon being hired by Brad Dinolfo concerning locating his stolen property and knew I was going to the suspected location of said property; they knew after being told the property was inside the said residence, I waited until the police arrived before entering and removing the property from said premises with the residents' permission and that said property was removed with the residents' permission in the presence of the Police; that I was present when the depositions of James Davis and Harry Yockey were taken and know they admitted having a copy of the Ohio Revised Code in their office or available prior to writing the editorial; that they conferred with each other before it was written and that they reviewed the prior *news* stories printed in their own paper and they saw in print in their own paper of the Police Force's prior knowledge of my actions and their presence at the same AND ALL OF *THIS KNOWLEDGE WAS THEIRS PRIOR TO PUBLISHING THE EDITORIAL.* This was not only *reckless disregard* for the truth but was a deliberate misrepresentation of the truth."

Affidavit of Jerry Dupler dated February 14, 1977.

The Defendant in this case is the Mansfield Journal Company, Inc. The Defendant admits in answer that they published on its editorial page in its said newspaper the Times-Reporter, the editorial heretofore mentioned. The Plaintiff was an elected councilman of the City of Dover and a declared

candidate for the Mayor of the City of Dover at the said time, April 9, 1975. The editorial staff of the Times-Reporter was at the time Harry Yockey, Editor, James E. Davis, Managing Editor, and Dick Farrell, Tom Simmerlink, and Joseph Mizer, reporters.

"For the purposes of this opinion, the Court will assume that the Plaintiff was a public official and that the Defendant is entitled to the First Amendment Rights."

The Defendant in this case is Mansfield Journal Company, Inc. The Times-Reporter is a newspaper of general circulation in Tuscarawas and adjoining counties, and the same is published by the Defendant, Mansfield Journal Company, Inc. On or about April 9, 1975, an editorial was published in said Times-Reporter, said Editorial accused the Plaintiff of criminal conduct of which the Plaintiff was not guilty.

This Court does not need to find that members of the editorial staff knew that the Plaintiff was not guilty. This Court does find, however, that reasonable minds could infer from the exhibits, affidavits, depositions, interrogatories and admissions, that the editorial staff knew that the Plaintiff was not guilty of the alleged offenses.

> "A party against whom a motion for summary judgment is made is entitled under Ohio Civil Rule 56 to have the pleadings, depositions, answers to interrogatories, affidavits, admissions, stipulations, and other documents or evidence considered on the motion construed most strongly in his favor. This was also true under former R.C. 2311.041. Thus, in ruling on a motion for summary judgment the court must construe the evidence in its most favorable light in favor of the party opposing the motion and against the movant. Indeed, it is the duty of

the court, in considering a motion for summary judgment, to scrutinize the evidence and to view it, as well as any inferences, in the most favorable light to the opposing party. On a motion for summary judgment, the inferences to be drawn from the underlying facts contained in such materials as affidavits, attached exhibits, and depositions must be viewed in the light most favorable to the party opposing the motion.

In determining whether one moving for a summary judgment is entitled thereto, a court, in considering the matters presented, must view such matters and all reasonable inferences deducible therefrom in the most favorable aspect that they will bear in support of the right to trial on the issues. It is said that because of the drastic potentials of a motion for summary judgment, it is almost universal practice to scrutinize with care and particularity the affidavits and other papers of the moving party while indulging in some leniency with respect to the affidavits and other papers of the opposition. All doubts and all favorable inferences which may be reasonably drawn from the evidence will be resolved against a party moving for a summary judgment. If after examination of the affidavits and other materials, if any, doubt exists as to whether a summary judgment should be granted, the doubt should be resolved against the moving party."

32A O Jur 2d, Judgments, Section 909, page 461-462.

Applying the rules for construction of affidavit and other materials, reasonable minds could conclude,

but not necessarily so, that false statements were published with knowledge of falsity and intentionally or recklessly. The motion for summary judgment should, therefore, be overruled.

Attorneys for the Plaintiff to prepare the appropriate entry.

RAYMOND C. RICE
JUDGE, COURT OF COMMON PLEAS

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

JERRY DUPLER,
Petitioner,

v.

MANSFIELD JOURNAL CO.,
Respondent.

APPENDIX "D"
PETITIONER'S MOTION FOR REHEARING TO OHIO SUPREME COURT.

IN THE SUPREME COURT OF OHIO

JERRY DUPLER,
Plaintiff-Appellant,

vs

MANSFIELD JOURNAL CO.,
Defendant-Appellee.

CASE NO. 80-196

APPEAL FROM THE COURT OF APPEALS
FIFTH DISTRICT
TUSCARAWAS COUNTY, OHIO
Filed December 29, 1980

MOTION FOR REHEARING

MOTION

Now comes Appellant, Jerry Dupler, by and through his Attorneys and respectfully moves for

rehearing of this appeal. Such Motion is made pursuant to Rule IX, Section 1, of the Rules of Practice of the Supreme Court of Ohio, and is based on the following grounds:

1. Summary Judgment is not the appropriate vehicle for disposing of a Libel Action.

2. Even if the Trial Court erred in denying Defendant's Motion for Summary Judgment, the error was rendered harmless by the evidence adduced at trial.

MEMORANDUM

1. Summary Judgment is not the proper vehicle for disposing of a Libel Action. In the case of *HUTCHINSON vs. PROXMIRE,* 443 U.S. 111, 61 L. Ed 2d 411, 99 S. Ct. 2675 (1979), the Supreme Court reversed the granting of a Summary Judgment to Defendants, intimating that the issues involved in a Libel Action brought by a public figure are too complex to be dealt with by Summary Judgment. 443 U.S. at 120, 61 L. Ed 2d at 422, n. 9.

The Supreme Court disagreed with the position taken by the District Court that in determining whether a Plaintiff had made an adequate showing of "actual malice", Summary Judgment should be the rule rather than the exception:

> Considering the nuances of the issues raised here, we are constrained to express some doubt about the so-called "rule". The proof of "actual malice" calls a Defendant's state of mind into question, *NEW YORK TIMES CO. vs. SULLIVAN,* 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710, 95 ALR 2d 142 (1864), and does not readily lend itself to summary disposition. 443 U.S. at 120, 61 L. Ed. 2d at 422, n.9.

2. Even if the Trial Court erred in denying Defendant's Motion for Summary Judgment, the error was rendered harmless by the evidence later adduced

at trial. Rather than focus its attention on the Summary Judgment issue, the Court should have focused its attention on the Directed Verdict issue. This is the position taken by Justice William B. Brown in his concurring opinion. Neither the Appellee nor the majority cite any authority for the proposition that such error should not be deemed harmless. The Appellant, on the other hand, has cited on page 44 of his brief considerable authority to the effect that such error is harmless and should be disregarded on appeal.

Were the Court to deem such error harmless, it would then be free to consider the entire record rather than limit itself to the relatively undeveloped evidence which was before the Trial Court when it ruled on Appellee's Motion for Summary Judgment.

And were the Court to consider the entire record, it would then have to consider the admission elicited from the Editor of the newspaper that he totally disregarded whatever the truth was and printed what he wanted to print. (T.111). One reasonable inference which could be drawn from such admission is that the author of the false statement knew at the time of publishing such statement that it was in fact false. Where the inferences which a jury draws from the evidence before it are reasonable, a directed verdict should not be granted.

PROOF of SERVICE

A true copy of the foregoing instrument was served upon all counsel of record or, if not represented, upon all parties to the within action by mailing United States mail postage prepaid on the 29th day of Dec., 1980

By: Joseph I. Tripodi

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

JERRY DUPLER,
Petitioner,

v.

MANSFIELD JOURNAL CO.,
Respondent.

APPENDIX "E"
DENIAL OF PETITIONER'S MOTION FOR REHEARING TO THE SUPREME COURT OF OHIO.

THE SUPREME COURT OF THE STATE OF OHIO

1981 TERM

THE STATE OF OHIO
City of Columbus.

To wit: January 22, 1981

JERRY DUPLER,
Appellant,

vs.

MANSFIELD JOURNAL COMPANY,
Appellee.

No. 80-196
REHEARING

It is ordered by the court that rehearing in this case is denied.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

JERRY DUPLER,
Petitioner,

v.

MANSFIELD JOURNAL CO.,
Respondent.

APPENDIX "F"
JUDGMENT ENTRY OF TRIAL COURT

STATE OF OHIO, TUSCARAWAS COUNTY, SS:
IN THE COURT OF COMMON PLEAS
New Philadelphia, Ohio

Filed March 27, 1979

JERRY L. DUPLER,
Plaintiff,

vs

MANSFIELD JOURNAL CO., INC.,
Defendant.

CASE NO. 46762

JUDGMENT ENTRY

This Action came on for Trial before the Court and a Jury and the issues having been duly tried and the Jury having duly rendered it's verdict as follows;

VERDICT FOR THE PLAINTIFF:

General Damages	$34,000.00
Punitive Damages	$100,000.00
Attorney Fees	$15,000.00
TOTAL	$149,000.00

WHEREFORE, it is ordered, adjudged and decreed that the Plaintiff, JERRY L. DUPLER, recover of the Defendant, THE MANSFIELD JOURNAL CO., INC., the total sum of One hundred forty-nine thousand dollars ($149,000.00), with interest thereon at the rate of Six Percent (6%) per annum as provided by law from date of Judgment and Defendants are further ordered to pay the costs of this Action.

HONORABLE JUDGE
RAYMOND C. RICE

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

JERRY DUPLER,
Petitioner,

v.

MANSFIELD JOURNAL CO.,
Respondent.

APPENDIX "G"
INTERROGATORIES SUBMITTED TO JURY.

INTERROGATORY NO. 1

Do you find that any of the statements contained in Defendant's editorial of April 9, 1975 (Plaintiff's Exhibit A) was false?

ANSWER "YES" or "NO"

YES	NO
8 Jurors Signed	0 Jurors Signed

INTERROGATORY NO. 2

If you find that any of the statements contained in Defendant's editorial of April 9, 1975 (Plaintiff's Exhibit A) was false, do you find by clear and convincing evidence that any of said statements was made with actual malice at the time of publication?

ANSWER "YES" or "NO"

YES	NO
6 Jurors Signed	2 Jurors Signed

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

JERRY DUPLER,
Petitioner,

v.

MANSFIELD JOURNAL CO.,
Respondent.

APPENDIX "H"
ARTICLE OF APRIL 4, 1975

DUPLER UPSETS PHILA POLICE WITH PRIVATE THEFT INQUIRY

Dover Councilman-at-Large Jerry Dupler, acting as a private investigator, could face criminal charges for his involvement in a case which was in the jurisdiction of the New Philadelphia police department, The Times-Reporter has learned.

According to police, Dupler, a Dover mayoral candidate, violated a section of the Ohio Revised Code which states a private investigator must give a sheriff and police chief 12 hours advance notice of his involvement in a case.

The case involved the theft of a $300 Panasonic stereo from the Grandview Inn at Dover, which is owned by Brad Dinolfo. The stereo and other items were taken during a breakin at the tavern on March 21 or 22.

According to New Philadelphia police, Dupler — who displayed the credentials of a licensed private investigator — and Dinolfo asked officers on March 25 to help them recover the stolen stereo from an apartment in a home at 718 E. High av.

Dinolfo said he had obtained information leading to that location from an informant, which he refused to identify.

Police refused to accompany them, saying that they had to obtain a search warrant before they could enter the apartment to conduct a search.

At that time, Dupler said he and Dinolfo would go to the home anyway.

A short time later, police went to the home at the request of a woman who said she was calling for Dupler and Dinolfo.

When they arrived, they found Dupler and Dinolfo removing the stereo, four speakers, a bottle of wine and a cork screw which they claimed to have been stolen out of the home, police said.

Police told the pair to put the items in their cruiser.

Officers identified the occupants of the apartment as Tom Carlisle and Mike Willoughby. Willoughby was said to have permitted Dupler and Dinofo to enter the apartment.

Carlisle later told police that he purchased the stereo from someone in a car which was parked outside the Hi-Spot tavern on N. Tuscarawas av. in Dover.

Police still have the stereo and other items in their possession, but are not sure what to do with them.

Chief James Locker said today that no one has produced proof of ownership of the stereo, including Dinolfo. Locker said Dupler should have turned the case over to Dover and New Philadelphia police, so they could have conducted a "proper" investigation.

The chief said that the unorthodox involvement of

Dupler and Dinolfo have "screwed up" the investigation, and he is not sure if enough evidence can be gathered now to file charges.

The section of the Ohio Revised Code, under which Dupler could be charged, according to Chief Locker and Prosecutor Ron Collins, carries a minimum fine of $100 and a maximum of $1000 or imprisonment for not more than one year, or both.

Dupler, who regularly is employed as a truck driver for the Kline Potato Chip Co., and Dinolfo could not be reached for comment.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

JERRY DUPLER,
Petitioner,

v.

MANSFIELD JOURNAL CO.,
Respondent.

APPENDIX "I"
ARTICLE OF APRIL 5th, 1975

DUPLER WON'T BE CHARGED IN RECOVERY OF STOLEN ITEMS

Jerry Dupler, a Dover mayoral candidate and councilman-at-large, will not be charged with violating a section of the Ohio Revised Code because of his involvement in a case within the jurisdiction of the New Philadelphia police department, according to Assistant Prosecutor J. C. Shew.

Shew's comments followed a meeting in New Philadelphia Police Chief James Locker's office Monday in reference to the recovery of a $300 Panasonic stereo, stolen March 22 from the Grandview Inn at Dover, which is owned by Brad Dinolfo.

Dupler entered the case after being contacted by Dinolfo, who was upset with the Dover police department's apparent "lackadaisical attitude" in handling of information provided by Dinolfo.

Dinolfo said he had information that his stolen stereo was located in an apartment at 718 E. High av., New Philadelphia, and tried to get Dover police to act on the information, but was given "the runaround." He believes Dover police didn't want to have anything to do with the case, partially because Tom Carlisle, one of the occupants of the apartment where the stereo was located, is a brother-in-law to Capt. Tom Holmes of the Dover department.

Capt. Holmes admitted to The Times-Reporter that he is "a stepbrother-in-law" to Carlisle and for that reason he personally has not become involved in any investigation concerning Carlisle.

Therefore, Dinolfo said, he went to Dupler as a councilman and explained the situation to him. Dupler then offered to accompany Dinolfo to New Philadelphia as a private investigator, he said.

(Dupler is a licensed private investigator with Cloverleaf Security and has done work for Cloverleaf for the past year and a half, according to Earl (Lefty) Doriche, owner.).

Dupler and Dinolfo recovered the stolen stereo from New Philadelphia on March 25 after being told that police officers could not accompany them, unless a search warrant was obtained.

The stereo was turned over to New Philadelphia police after officers were called to the residence, occupied by Carlisle and Mike Willoughby, and waited outside while Dupler and Dinolfo, brought out the stolen equipment.

Dupler and Dinolfo's intervention in the case caused Chief Locker to comment that the investigation was fouled up and that he was not sure enough evidence could now be gathered to file charges against persons responsible for the theft.

The meeting Monday was "a brainstorming session," according to Shew — to see how much

information was available. It was attended by Locker, Shew, Dover Police Chief Jack Griffin, Dover, Ptl. Gale Herman, Dupler, Dinolfo and Atty. James Barnhouse.

Shew said the prosecutor's office won't charge Dupler with violating Ohio law which states a private investigator must give a sheriff and police chief 12 hours advance notice of his involvement in the case, Shew said. "We're not concerned with Dupler not notifying the police."

Prosecutor Ron Collins, who was not at the meeting, emphasized Shew's comments by stating that if such a violation did occur he would not prosecute it because of "a lack of criminal intent."

Collins said he had been contacted about a possible search warrant on the night of the recovery, but felt the police did not have sufficient justification for obtaining one at that time.

Shew and Locker said the investigation is continuing. The likelihood of charges being filed against anyone in connection with the theft of the stereo (unintelligible)

"We and all other law enforcement bodies appreciate any information which may help in an investigation, but we will not tolerate interference," he added.

In recovering the stolen stereo without a search warrant, however, "Dupler in no way obstructed the administration of justice," Shew said.

The stereo, four speakers, a bottle of wine and a cork screw, were returned to Dinolfo following the meeting.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

JERRY DUPLER,
Petitioner,

v.

MANSFIELD JOURNAL CO.,
Respondent.

APPENDIX "J"
ARTICLE OF APRIL 9th, 1975

PROSECUTOR'S OFFICE REMISS

The Tuscarawas County prosecutor's reaction to the seizure of a stolen stereo set and several other items at a New Philadelphia apartment by Jerry Dupler, Dover councilman and a private eye , is somewhat surprising.

Prosecutor Ron Collins indicated there would not be any prosecution because of "a lack of criminal intent."

Private investigators, under Ohio law, must inform authorities 12 hours in advance of participation in a case. The prosecutor revealed he had been contacted about a search warrant the night Dupler, acting in behalf of Brad Dinolfo, made the seizure. However, the prosecutor said he didn't think police had "sufficient justification" for a warrant.

The prosecutor's office, we are certain, prosecutes numerous cases wherein "criminal intent" is not

evident. J.C. Shew, an assistant prosecutor, added that their office isn't concerned that Dupler, employed by Cloverleaf Security, had not informed police of his intentions. Nor is the prosecutor's office concerned over the fact that Dupler did not have a search warrant.

It seems to us that Dupler, if he is qualified as a licensed private investigator, ignored Ohio law twice—by not giving authorities the proper notification and then by making a seizure without a search warrant.

It is proper to ask, in view of the circumstances, what the intent was behind Dupler's actions. It also is proper to ask if the prosecutor's office is politically motivated in its unconcern.

If Jerry Dupler is going to continue his work as a private eye the prosecutor's office should at least make certain he refrains in the future from ignoring Ohio statutes.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

JERRY DUPLER,
Petitioner,

v.

MANSFIELD JOURNAL CO.,
Respondent.

APPENDIX "K"
OHIO REVISED CODE §2739.13 and §2739.14

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§2739.13 Correction of false statement formerly published.

If any newspaper company, at any time, prints, publishes, or circulates any false statement, allegation, or rumor relating to any individual or association of individuals, or to any trade, labor, business, social, economic, or religious organization or to any firm, corporation, or business, or to any public official or candidate for a public office, such company upon demand of any persons affected or of their representatives, shall print, publish, and circulate any statement or article setting forth in proper language the truth pertaining to such statement, allegation, or rumor, which such persons or their representatives shall offer to such company for publication.

§2739.14 Publishing corrected statements.

Whenever demand has been made for the publication of statements or articles under section 2739.13 of the Revised Code, the newspaper company shall print and circulate the same in the next regular issue or within forty-eight hours following the receipt of such statement or article. Such statement or article shall be phrased in proper language and be printed without any additions to, or omissions therefrom, in the same color of ink, from like type, with headlines of equal prominence, occupying a like space in the same portion of the newspaper as was used in printing the original article complained of, and shall be given the same publicity in all respects and, as nearly as possible, the same circulation as such original article. Such company shall print and publish such statements or articles without cost to such persons or their representatives; and such publication may be proved at the trial of a suit for damages as a mitigating circumstance to reduce damages, provided that any voluntary publication made without demand may be used to rebut any presumption of malice or injury on the part of such company growing out of the original publication to which the same related. This section does not prevent the injured party from alleging and providing actual malice on the part of the publisher and any special damages resulting to him therefrom.

THIS APPENDIX IS RESPECTFULLY SUBMITTED BY

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CERTIFICATE OF SERVICE

The undersigned, being Co-counsel of record for Petitioner and members of the Bar of this Court, do certify that three(3) copies of this Petition for a Writ of Certiorari to the Supreme Court of Ohio/Appendix were hand delivered to the office of Richard M. Hanhart, Esq., Co-Counsel for Respondent, 405 Chauncey Ave., N.W., New Philadelphia, Ohio, 44663, Ph: 216-343-5585; and to the office of William A. Kyler, Esq., Co-Counsel for Respondent, 405 Chauncey Ave. N.W., New Philadelphia, Ohio, 44663, Ph: 216-343-5585; on the 21st, day of April, 1981.

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No. 80-1761

ALEXANDER L. S...

Supreme Court of the United States

October Term, 1980

JERRY DUPLER,
Petitioner,

vs.

MANSFIELD JOURNAL CO.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT

BRIEF OF RESPONDENT IN OPPOSITION

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No. 80-1761

Supreme Court of the United States

October Term, 1980

JERRY DUPLER,
Petitioner,

vs.

MANSFIELD JOURNAL CO.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT

BRIEF OF RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

This is an action for libel involving the Petitioner, Jerry Dupler ("Dupler"), who at the time of publication was a Councilman of the City of Dover, Ohio, a candidate for Mayor of said city, and a Private Investigator.

Dupler, as Plaintiff, brought suit in Common Pleas Court of Tuscarawas County, Ohio, complaining of statements in an editorial written by Editor Harry Yockey ("Yockey") and which was published April 9, 1975 in the Times-Reporter, a newspaper owned by the Defendant (Respondent) which was published in New Philadelphia, Tuscarawas County.

The first paragraph of Petitioner's *Statement of Facts* is incorrect. Dupler says that his cause of action is

"based upon a series of newspaper stories and an article appearing in the editorial page between the dates of April 4th and April 9th, 1975." (Page 3 of Petitioner's Brief).

In fact, Dupler complained *only* of the editorial of April 9, 1975 in the Complaint he filed in Court, and in his subsequent testimony. (T. 299)* The editorial in question is Petitioner's Appendix "J" and is reproduced as published, as Respondent's Appendix "A6".**

Dupler, first contacted by a constituent as a Councilman (T. 270), and later hired by him to do private investigatory work (T. 271) became involved in a controversy with the New Philadelphia Police relating to his activities as a Private Investigator.

These events were reported by the Times-Reporter in two news articles, one (P-A. "H") published April 4, 1975, and the other (P-A. "I") published April 8, 1975. (This article is erroneously designated as an article of April 5*th* in Petitioner's Appendix.)

It is uncontradicted that the editorial (R-A. A6), was written solely by the Editor (Yockey) who had obtained the facts from the two preceding news articles published in the Times-Reporter (Yockey Deposition pages 6-8; T. 95, 96). These two news articles reported the details of an inquiry by the New Philadelphia Police and the Tuscarawas County Prosecutor into Plaintiff's procedure as a private investigator in recovering stolen property for a client. The news facts for the two articles were gathered by various reporters and the two articles

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*References to "T. ....." are to appropriate pages of the transcript of the trial.

**References to "P-A. ....." are to appropriate pages of the Appendix of Petitioner's Brief and references to "R-A. ....." are to appropriate pages of the Appendix to Respondent's Brief.

themselves were written by separate reporters, all as normal beat coverage. Yockey was not personally involved in the investigation, writing or publication of the two articles.

The first news story contained a misinterpretation of Section 4749.05, Ohio Revised Code (R-A. A2) relating to procedures to be employed by a private investigator. This Code section states (among other provisions):

....

"(B) No private investigator nor any of his employees shall engage in the business of private investigation unless, *within twelve hours of their arrival,* they report their presence and length of stay to the sheriff and police chief of any county or municipality in which they operate." (emphasis added).

After conference with the Police Chief and a perusal of the Code section (T. 145), Reporter Simmelink wrote, in the second paragraph of the first news article on April 4th (P-A. "H"):

"According to police, Dupler, a Dover mayoral candidate, violated a section of Ohio Revised Code which states a private investigator must give a sheriff and police chief 12 hours *advance notice* of his involvement in a case." (emphasis added).*

Continuing at the 15th paragraph of this article of April 4th, Reporter Simmelink says:

"The chief said that the unorthodox involvement of Dupler and Dinolfo have 'screwed up' the investiga-

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*Note that the reporter has said *"advance notice"* rather than the wording of the statute, *"Within 12 hours of their arrival"*. This misinterpretation carries through this first news article of April 4th, the second news article of April 8th, and the editorial of April 9th (the subject of this action).

tion, and he is not sure if enough evidence can be gathered now to file charges."

Chief Locker admitted discussing these matters with the reporter, and making these statements (T. 198-199).

The misquote regarding the statute was continued in the article of April 8th written by another reporter (Mizer) at the 12th paragraph (P-A. "I"):

> "Shew said the prosecutor's office won't charge Dupler with violating Ohio Law which states a private investigator must give a sheriff and police chief 12 hours advance notice of his involvement in the case, Shew said 'We're not concerned with Dupler not notifying the police'."

Again, at the 13th paragraph:

> "Prosecutor Ron Collins, who was not at the meeting, emphasized Shew's comments by stating that if such a violation did occur, he would not prosecute it because of 'a lack of criminal intent'."

Editor Yockey, in his editorial written the preceding day and published on April 9th, commented upon the lack of motivation by the prosecutor in following up on Dupler's activities involving the City Police. The editorial column (plainly marked "Opinion") (R-A. A6) contained, in its entirety, the following views:

> "PROSECUTOR'S OFFICE REMISS
>
> The Tuscarawas County prosecutor's reaction to the seizure of a stolen stereo set and several other items at a New Philadelphia apartment by Jerry Dupler, Dover councilman and a private eye, is somewhat surprising.

Prosecutor Ron Collins indicated there would not be any prosecution because of 'a lack of criminal intent.'

Private investigators, under Ohio law, must inform authorities 12 hours in advance of participation in a case. The prosecutor revealed he had been contacted about a search warrant the night Dupler, acting in behalf of Brad Dinolfo, made the seizure. However, the prosecutor said he didn't think police had 'sufficient justification' for a warrant.

The prosecutor's office, we are certain, prosecutes numerous cases wherein 'criminal intent' is not evidence. J. C. Shew, an assistant prosecutor, added that their office isn't concerned that Dupler, employed by Cloverleaf Security, had not informed police of his intentions. Nor is the prosecutor's office concerned over the fact that Dupler did not have a search warrant.

It seems to us that Dupler, if he is qualified as a licensed private investigator, ignored Ohio law twice—by not giving authorities the proper notification and then by making a seizure without a search warrant.

It is proper to ask, in view of the circumstances, what the intent was behind Dupler's actions. It also is proper to ask if the prosecutor's office is politically motivated in its unconcern.

If Jerry Dupler is going to continue his work as a private eye the prosecutor's office should at least make certain he refrains in the future from ignoring Ohio statutes."

The Editor made no separate investigation of the facts other than to specifically ask the Managing Editor a ques-

tion as to the respective political parties of the Plaintiff and the Prosecutor. He relied upon the information in the two news articles as being accurate, in writing and publishing the editorial (Yockey Deposition pp. 8-22, 49) (T. 96-111; 338-395). This evidence was not contested or contradicted in the Motion for Summary Judgment or during trial.

Four months after publication, the Times-Reporter received a letter dated August 6, 1975 (R-A. A7), from Dupler's attorney demanding that an enclosed sworn statement from Dupler (R-A. A8) be published in accordance with "Section 2739.13, Section 2739.14, Section 2739.15 and Section 2739.16 of the Revised Code of the State of Ohio." (Petitioner has included Sections 2739.13 and 2739.14 as (P-A. "K-1" and "K-2"). Respondent has included Section 2739.15 and Section 2739.16 as R-A. A1.) On August 12, 1975, the Defendant published on the editorial page of its newspaper, Dupler's proffered statement under the headline "editorial is rebutted". (R-A. A10)

Preliminary Motions and Trial

On March 12, 1976, the libel Complaint in this action was filed. Dupler, Plaintiff, complained of the editorial of April 9th, 1975. Defendants answered, and asserted that the article was privileged under the United States Constitution, denying Plaintiff's claim of "actual malice" and asserting that the statements were true. Dupler answered Interrogatories and made certain written admissions propounded by Defendant. Defendant deposed Dupler.* Dupler deposed Editor Yockey and the Managing Editor, James Davis. On the basis of the facts developed in these pleadings, depositions and other discovery, Defendant moved

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*Pertinent portions of Dupler's testimony at deposition, i.e., actual malice is included in Respondent's Appendix at A11.

for Summary Judgment. Dupler filed his own affidavit opposing the Motion. Said affidavit was not pertinent to the issue of actual malice. After fifteen months of deliberation on the Motion, on April 17, 1978, the Trial Court denied the Motion for Summary Judgment, deciding that the use of the words "it seems to us" in the style of the editorial, created the "thread" of an issue that persons other than Yockey might have written the editorial, thus creating a fact to be determined by a jury (P-A. "C-3", "C-5"). The action proceeded to trial by jury. At the outset of trial Defendant's request for a reconsideration of its Motion for Summary Judgment was denied. At the close of Plaintiff's evidence, Defendant moved for a Directed Verdict on the ground that Dupler had failed to meet his burden, as a public official, of introducing sufficient evidence from which the jury could conclude that Defendant published Yockey's editorial with knowledge that facts therein were false or with a high degree of awareness of their probable falsity. The Motion was overruled (T. 336, 351). The Motion for Directed Verdict was renewed at the close of Defendant's evidence at which time it was again overruled (T. 398). The jury returned a verdict in favor of Dupler for general and punitive damages and attorneys fees in the total amount of $149,000.00 (P-A. "F-1").

The Decision of the Court of Appeals

The Respondent appealed to the Court of Appeals, 5th District, Tuscarawas County, citing seven Assignments of Error. The Court of Appeals reversed the jury verdict, sustaining Defendant's first four Assignments of Error (see the Court of Appeals' Opinion P-A. "B"), deciding that the Trial Court erred

(1) in failing to sustain Defendant's Motion for Summary Judgment;

(2) in failing to sustain Defendant's Motions for a Directed Verdict because Plaintiff had failed to show "actual malice" as the term constitutionally relates to Plaintiff as a public official in a libel action; and,

(3) in failing to sustain the Motions for Directed Verdict because the statements were expressions of opinion and were therefore protected as privileged comment;

(4) in failing to sustain Defendant's objection to Plaintiff's introduction of testimony relating to Defendant's compliance or non-compliance with O.R.C. 2739.13, 2739.14; 2739.15 in printing Plaintiff's reply, for the reason that the statutes are unconstitutional and testimony regarding Defendant's compliance or lack of compliance was prejudicial on the issue of malice.*

The remaining three Assignments of Error being moot were not considered.

The Decision of the Ohio Supreme Court

The Plaintiff Petitioner then sought review by a Motion to Certify the record of the Court of Appeals to the Ohio Supreme Court. The Court of Appeals had sustained Respondent's Fourth Assignment of Error, and had determined that Ohio Revised Code Sections 2739.13 and 2739.14 (P-A. "K-1", "K-2") were unconstitutional as being an infringement of the First Amendment of the Constitution of the

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*Petitioner relies heavily upon the fact that the jury in answering Interrogatories submitted with the verdict (P-A. "G-1") certain facts were "false" and that they were published with "actual malice". It was interesting to note that the Court of Appeals commented in its opinion (P-A. "B-17") that the Trial Court, by permitting prejudicial evidence to be admitted on the question of "Retraction" as it applied to the Editor's "state of mind" might explain the jury's finding of "actual malice".

United States and contrary to this Court's decision in *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974), and consequently the Motion to certify the record was granted. Thereafter the Ohio Supreme Court reviewed the entire record, as it was bound to do, and affirmed the Court of Appeals' judgment for the Defendant. In the words of the Ohio Supreme Court (P-A. "A-11"):

> "Having re-examined all the evidence before the Trial Court on the Motion for Summary Judgment, and taking all reasonable inferences in the light most favorable to Appellant, we find that a jury acting reasonably could not find actual malice with convincing clarity. Therefore, summary judgment should have been granted for Appellee.[6]"

Further, the Court in its Footnote 6 (P-A. "A-11") said:

> "In the light of this conclusion, it is unnecessary for this Court to review the Court of Appeals' determination that Defendant's Motions for Directed Verdict should also have been granted. However, we do note that there was no additional evidence adduced at trial from which a reasonable jury could find actual malice, at the time of publication, with convincing clarity."*

The Ohio Supreme Court did, however, further decide that while the admission of evidence regarding Defendant's actions or failure to act with regard to the retraction were prejudicial and inappropriate as bearing on the mental state and attitude of Yockey, the admission of evidence did not raise the issue of the constitutionality of these statutory provisions. Consequently the Court of Appeals

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*Neither, did the Ohio Supreme Court comment on the Court of Appeals' decision that the editorial was an expression of opinion and hence privileged. (Defendant's Assignment of Error #3 to the Court of Appeals.)

had no occasion to pass on their constitutionality, and erred in so doing (P-A. "A-12").

Petitioner's Motion for Reconsideration was rejected and it is from this Order that he appeals to this Court for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

1. THE DECISION OF THE SUPREME COURT OF OHIO AFFIRMING THE FIFTH DISTRICT (OHIO) COURT OF APPEALS DECISION WHICH CORRECTLY APPLIED THE SUMMARY JUDGMENT PROCEDURE OF THE OHIO RULES OF CIVIL PROCEDURE DOES NOT CONFLICT WITH THE DUE PROCESS PRINCIPLES ENUNCIATED BY DECISIONS OF THIS COURT.

Rule 56 of the Ohio Rules of Civil Procedure (see R-A. "A2") is substantially identical to Rule 56 of the Federal Rules of Civil Procedure.

It has long been established that Summary Judgment is a constitutionally viable procedure, and one approved by this Court, where correctly applied. In support of its Motion for Summary Judgment the Respondent submitted competent evidence directed toward the propositions that the Editor (Yockey) was solely responsible for the writing and publishing of the editorial; that his information was gathered solely from his reading of the two previous news articles, and; that at the time of publishing the editorial he did not know it contained erroneous statements gleaned from those previous articles. He was oblivious of any inaccuracy until he received a letter from Dupler's attorney four months later.

Petitioner did not submit any evidence relative to this issue to counter the Motion for Summary Judgment or to support his claim at trial.

If, as the Court of Appeals agreed, Yockey's comments did not rise above an opinion of the statutory obligation of the Plaintiff Dupler (based upon disclosed facts in the editorial and the preceding two news articles), then said comments although erroneous, were privileged, and the Editor's knowledge was not an issue (P-A. "B-14"). *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Orr v. Argus-Press Company*, 586 F.2d 1108 (6th Cir. 1968), *cert. denied*, 440 U.S. 960; RESTATMENT OF TORTS (Second) (A.L.I.) Section 566 (1977).*

If, however, the comments of Yockey in the editorial were not privileged opinion, then, in the light of the evidence submitted by the Respondent in support of the Motion for Summary Judgment, Petitioner was obligated to demonstrate to the court that the evidence before the court, construed most favorably to him, demonstrated a genuine issue of fact concerning the material issue, i.e., actual malice.

Consistent with *New York Times v. Sullivan*, 376 U.S. 254 (1964) is the proposition that only the publication of knowing falsehoods or falsehoods published with reckless disregard of the truth are actionable. Reckless disregard, this Court has held, may only be proved by demonstrating that the Defendant "entertained serious doubts as to the truth" of the publication, *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968), or published with a "high degree of awareness of their probable falsity" *Garrison v. Louisiana*,

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*The Supreme Court of Ohio did not rule on the Court of Appeals decision sustaining this Assignment of Error, having determined that the appeals court was correct in granting Defendant's Motion for Summary Judgment.

379 U.S. 64, at 74 (1964). See generally, *Herbert v. Lando,* 441 U.S. 153 (1979). Certainly the comments in the editorial relative to this public official, a candidate for office, were pertinent. *Monitor Patriot Co. v. Roy,* 401 U.S. 265 (1971).

Petitioner accepts the above principles as applying in this case (Petitioner's Brief, page 8). It should be noted that he does not argue in his Brief that the reviewing courts came to an incorrect decision when they considered all of the evidence before the Trial Court *at the Summary Judgment stage* and, resolving all reasonable inferences in a light most favorable to him, that a jury acting reasonably could find actual malice with convincing clarity. Instead, he argues that this Court's decision in *Hutchinson v. Proxmire,* 433 U.S. 11 (1979) rendered summary judgment procedure in First Amendment cases somehow ineffective, or of at least little value, and further, that a reviewing court is precluded from reviewing the evidence at the summary judgment stage after a jury verdict, supported by jury interrogatories, had decided the same issue.

The issue properly before this Court is not whether summary judgment is viable as a concept, but whether Ohio summary judgment procedure was correctly applied in this cause. Otherwise stated, did the Petitioner receive due process in the Ohio Appellate review?

It is clear to Respondent that the decision in *Hutchinson v. Proxmire, supra,* does not apply in this case. It is equally clear that this Court's comment in Footnote 9 of *Hutchinson v. Proxmire* has initiated a second look at summary judgment procedure in First Amendment cases. If it had been the rule rather than the exception that summary judgment be granted—that so called rule no longer exists. For those trial courts who had considered that the

rules applicable to summary judgment in all civil cases should be applied equally in First Amendment cases, the comment in Footnote 9 of *Hutchinson* was of little significance. Those courts who would have taken a more liberal view, have engaged in introspection. It was inevitable that learned courts would reason and that reasonable guidelines would emerge.

Respondent accepts the reasoning of the District of Columbia Court of Appeals in *Nader v. de Toledano,* 408 A.2d 31 (D.C. App. 1979), *cert. denied,* 100 S. Ct. 1028, 62 L. Ed. 2d 761 (1980) wherein the Court analyzed what it considered to be three different views toward the application of summary judgment procedure in First Amendment cases, i.e., Judge Wright's opinion in *Wasserman v. Time, Inc.,* 424 F.2d 920 (1970), *cert. denied,* 90 S. Ct. 1844; the view expressed by the Court in *Guam Federation of Teachers Local 1581 v. Ysrael,* 492 F.2d 438 (9th Cir. 1974), *cert. denied,* 419 U.S. 872 (1974); and a somewhat different approach in the Washington Supreme Court case *Chase v. Daily Record, Inc.,* 83 Wash. 2d 37, 515 P.2d 154 (1973), before coming up with a more traditional approach. In *Nader,* the court reasoned:

> "The question to be answered by the Trial Court must and will remain the same—is there a genuine issue of material fact from which a reasonable jury acting reasonably could find actual malice with convincing clarity? Thus, the Court examines the evidence, taking all permissible inferences and resolving questions of credibility in Plaintiff's favor to determine whether *a reasonable jury acting reasonably could find actual malice with convincing clarity.* The question to be resolved at summary judgment is whether Plaintiff's proof is sufficient such that a reasonable jury could find malice with convincing clarity, *and*

not whether the trial judge is convinced of the existence of actual malice." (Court's emphasis). 408 A. 2d, at page 50.

The Second Circuit Court of Appeals has cited with approval *Nader v. de Toledano* in *Yiamouyiannis v. Consumers Union of the United States, Inc.*, 619 F.2d 932 (2d Cir. 1980) where at page 940 the Court, in making its own determination, said:

> "Until more directly advised, we think that this neutral approach correctly states the rule as it is presently in force: neither grant nor denial of a motion for summary judgment is to be preferred. Defamation actions are, for procedural purposes such as discovery, see *Herbert v. Lando,* 441 U.S. 153, 99 S. Ct. 1635, 60 L. Ed. 2d 115 (1979), or for summary judgment, to be treated no differently from other actions; any 'chilling effect' caused by the defense of a lawsuit itself, see *Herbert v. Lando,* 568 F.2d 974, 980 (2d Cir. 1977) (Kaufman C. J., for the Court), rev'd, 441 U.S. 153, 99 S. Ct. 1635, 60 L. Ed. 2d 115 (1979); id. at 993-994 (Oaks, J., concurring); *Washington Post Co. v. Keogh, supra,* 365 F. 2d at 968, is simply to be disregarded, to have no force and effect."

It is clear that the Ohio Supreme Court was apprised of the reasoning in *Nader v. de Toledano* in its deliberations, that case having been cited by Respondent, and the Court did in fact adopt the wording of *Nader* in its ruling and its first syllabus.* Further, the Ohio Supreme

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*"Syllabus 1. In ruling upon defendant's motion for summary judgment in a libel action brought by a public official, the court shall consider the evidence and all reasonable inferences to be drawn therefrom in the light most favorable to the plaintiff to determine whether a reasonable jury could find actual malice with convincing clarity." (Ohio Supreme Court Opinion, P-A. "A-1").

Court cited the proposition in *Hotchner v. Castillo-Puche*, 404 F. Supp. 1041 (S.D., N.Y.) at page 1050, in its Opinion (P-A. "A-7"),

> ". . . principles applicable to summary judgment motions generally, are applicable to such motions when made in a defamation action." Further, the Ohio Court cited, in support thereof, *Yiamouyiannis v. Consumers Union of the United States, Inc., supra*; and *Tagawa v. Maui Publishing Co.*, 448 P.2d 337 (Hawaii, Sup. Ct. 1968).

Having determined that the Ohio Supreme Court applied the proper standard for review, and that there was no evidence creating a jury issue of actual malice, the Court properly determined that the Appellate Court was correct in rendering summary judgment for Defendant.

The reference to *trial* testimony of Yockey at page 15 of Petitioner's Brief, albeit taken out of context,* has no bearing on whether the evidence before the Court at *Summary Judgment stage* made an issue of actual malice, and references to the effect of the jury verdict, and the jury's answers to Interrogatories are similarly not significant.**

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*Yockey's testimony relative to this point is printed more fully (R-A. A14).

**The Court of Appeals and the Ohio Supreme Court concluded that *trial testimony* and *trial evidence* did not carry Plaintiff's burden of proving actual malice, after the fact (Court of Appeals' Opinion, P-A. "B-13" and Supreme Court's Opinion, Footnote 6, P-A. "A-13").

2. THERE IS NO EVIDENCE OF ANY CONFUSION AMONG STATE OR FEDERAL COURTS RELATIVE TO THE PROPRIETY OF THE USE OF SUMMARY JUDGMENT PROCEDURE IN LIBEL CASES WHICH REQUIRE CLARIFICATION BY THIS COURT.

The law ebbs and flows, adapting itself within the perimeters established by this Court.

There has, of course, been evolution with regard to the use of summary judgment procedures in defamation actions since this Court's pronouncement in *New York Times v. Sullivan, supra.* As previously indicated, Respondent believes that Footnote 9 in *Hutchinson v. Proxmire, supra,* has occasioned a more introspective analysis by trial courts when confronted with such a motion in First Amendment cases. While summary judgment procedure remains as viable as ever, supporting opinions of courts granting the motion indicate a greater regard for and deeper inquiry into the application of the procedure and due process. *Nader v. de Toledano, supra, Yiamouyiannis v. Consumers Union of the United States, Inc., supra.* Recently, trial courts while granting Motions for Summary Judgment on the issue of actual malice in First Amendment cases, have either cited or discussed one or all of the opinions in *Hutchinson v. Proxmire, Nader v. de Toledano* or *Yiamouyiannis v. Consumers Union of the United States, Inc.: Steaks Unlimited v. Deaner, et al.,* 468 F. Supp. 779, *aff'd* 623 F.2d 264 (3rd Cir. 1980); *Rinsley v. Brandt,* 446 F. Supp. 850 (1980) (D.C. Kansas); *Loeb v. Globe Newspaper Co., et al.,* 489 F. Supp. 481 (1980) (D.C. Mass.); *Loeb v. New Times Communication Corp.,* 497 F. Supp. 85 (1980) (D.C. S. Dist. N.Y.); *MacGuire v. Harriscope Broadcasting Co.,* 612 P.2d 830 (1980) (Wyo. Sup. Ct.); *McMurray v. Howard Publication,* 612 P.2d 14

(1980) (Wyo. Sup. Ct.); *DiLeo v. Koltnow*, 613 P.2d 318 (1980) (Colo. Sup. Ct.); *Brophy v. Philadelphia Newspapers, Inc.*, 422 A.2d 625 (1980) (Pa. Sup. Ct., Phila. Dist.). The following recent cases, while not specifically citing *Hutchinson* or *Nader* do, in well reasoned decisions uphold the summary judgment procedure in First Amendment cases: *Fitzgerald v. Minnesota Chiropractic Association, Inc.*, 294 N.W.2d 269 (1980) (Minn. Sup. Ct.); *Hodges v. Oklahoma Journal*, 617 P.2d 191 (1980) (Okla. Sup. Ct.); *Ihle v. Florida Publishing Co.*, 392 So. 2d 1375 (1980) (Fla. Sup. Ct.).

These cases from a broad spectrum of jurisdictions are offered only to refute Petitioner's proposition that there is "confusion" with regard to the propriety of summary judgment procedure. To the contrary, they demonstrate the ability of our judicial system to respond to the interworkings of the First Amendment and due process under the Fourteenth Amendment.

We must comment upon the often used argument that this Court's ruling in *Poller v. Columbia Broadcasting Systems Inc.*, 368 U.S. 464 (1961) precludes the use of summary judgment procedure in libel action because they are not appropriate "where motive and intent play leading roles". We offer the reasoning of the District Court in *Loeb v. Globe Newspaper Co.*, 489 F. Supp. 481 (1980) (U.S. Dist. Ct., Massachusetts), where the Court said, at page 487 in granting the summary judgment for Defendant,

> "Plaintiff correctly observes that summary judgment is disfavored in instances in which motive and intent are at issue. *Poller v. Columbia Broadcasting Systems Inc.*, 368 U.S. 464 (1961). At the same time, courts must be vigilant to prevent unwarranted inquiries into the exercise of First Amendment rights, lest repeated obligations to vindicate a right create

> a burden upon its exercise. In short, as the court determined in *New York Times Co. v. Sullivan, supra,* '[A] rule compelling the critic of official conduct to guarantee the truth of all of his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable self-censorship'. 378 U.S. At 279. The use of summary judgment in this case must balance two competing interests: the obligation to avoid 'chilling' the exercise of treasured First Amendment rights, and caution to avoid foreclosing a genuine issue of fact."

Petitioner cites three state court decisions and three federal court decisions in support of his contention that confusion exists as to the propriety of summary judgment in libel actions.

The first is *Sprouse v. Clay Communications, Inc.* (Supreme Court of Appeals of West Virginia) 211 S.E.2d 674 (1975), a case which does not even deal with the standard to be followed on the issue of "actual malice" in determining a summary judgment motion. *The only summary judgment motion in that case raised the issue of res judicata.* 211 S.E.2d at 694.

In *Good Government Group of Seal Beach, Inc. v. Superior Court of Los Angeles County* (Supreme Court of California) 150 Cal. Rptr. 258, 586 P.2d 572 (1978), the Supreme Court of California, applying the test as to actual malice under *New York Times v. Sullivan* and *Garrison v. Louisiana,* found that Plaintiff's affidavit filed in opposition to Defendants' Motion for Summary Judgment, reciting that Defendants publicly distributed the allegedly libelous article after its original publication and after being aware that the words in the article could be interpreted as defamatory, was sufficient to raise a jury issue as to actual malice.

In *Thomson v. Cash* (Supreme Court of New Hampshire) 402 A.2d 651 (1979), the Supreme Court of New Hampshire affirmed the trial court's denial of Defendant's Motion for Summary Judgment holding:

> "The question before us on this motion for summary judgment is only whether the defendants have met their burden of showing that no genuine issue of fact exists as to the existence of *New York Times* 'malice'. In our opinion, the affidavits and depositions already in the record support the trial court's conclusion that such an issue is presented." 402 A.2d 651.

Since the opinion does not set forth the evidence submitted opposing the summary judgment motion, it can only be presumed that the Court correctly applied the proper standard in determining the Motion for Summary Judgment.

Petitioner next cites *Cianci v. New York Publishing Company* (S.D. New York) 486 F. Supp. 368 (1979) wherein the District Court sustained Defendant's Motion for Summary Judgment on the ground that the evidence submitted failed to raise any jury issue as to actual malice.

In *Church of Scientology of California v. Siegelman* (S.D. New York) 475 F. Supp. 950 (1979), cited with approval in *Cianci v. New York Publishing Company, supra,* the District Court denied summary judgment as to one Defendant only on the basis that material submitted by Plaintiffs opposing the summary judgment motion created a jury issue as to actual malice. Since the opinion does not relate what evidence submitted by Plaintiffs created the jury issue, it can only be assumed that summary procedure was properly followed.

Finally, Petitioner cites *Nader v. de Toledano, supra,* and *Yiamouyiannis v. Consumers Union of the United States, supra,* as examples of confusion with respect to

the use of summary judgment procedure. Respondent disagrees with this assessment, and would cite these two cases as examples of a well reasoned position adopting a "neutral approach" in which summary judgment procedure is neither proffered nor declined, but rather adopting the position that summary judgment will be evenly applied in First Amendment cases as in other civil actions.

CONCLUSION

The decision of the Ohio Supreme Court affirming the Fifth District Court of Appeals' judgment granting summary judgment for the Respondent was proper and for the reasons set forth above the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: May 26, 1981.

APPENDIX

OHIO REVISED CODE

§ 2739.15 Published statements shall be sworn to.

(A) Every statement or article which newspaper companies are required to publish under section 2739.13 to 2739.18, inclusive, of the Revised Code, shall be sworn to by the person offering the same for publication, but the certificate of the notary or other official showing that the statement was so made under oath, shall not be published.

(B) No person shall willfully swear falsely to any such statement or article and whoever does so, is guilty of perjury.

No newspaper company shall be held liable in any civil or criminal proceedings for anything in any such statement or article.

§ 2739.16 Refusal or failure to publish.

(A) No newspaper company shall refuse or fail to print, publish, and circulate any statement or article if true as required by sections 2739.13 to 2739.18, inclusive, of the Revised Code.

(B) Any person responsible for refusing to print, publish, and circulate any statement or article mentioned in division (A) of this section shall be fined as provided in division (C) of section 2739.99.

The prosecuting attorney of the county in which such newspaper is published, when complaint is made to him in writing of the refusal or failure of any newspaper company or persons to comply with sections 2739.13 to 2739.18, inclusive, of the Revised Code relative to the publication

of such statements or articles, shall investigate said complaint and upon reasonable cause begin proceedings against such newspaper company or person and prosecute the same.

§ 4749.05 Required to report to sheriff and police chief.

(A) Each private investigator shall report the location of branch offices to the department of commerce, to the sheriff of the county and the police chief of any municipality in which the office is located, and shall post a certified copy of his license conspicuously therein. If a licensee moves an office, he shall notify, in writing, the department and any affected sheriff and chief of police within forty-eight hours of the change.

(B) No private investigator nor any of his employees shall engage in the business of private investigation unless, within twelve hours of their arrival, they report their presence and length of stay to the sheriff and police chief of any county or municipality in which they operate.

OHIO RULES OF CIVIL PROCEDURE

Rule 56

SUMMARY JUDGMENT

(A) For party seeking affirmative relief. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of the time permitted under these rules for a responsive motion or pleading by the adverse party, or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. However, if the action has been set

for pretrial, a motion for summary judgment may be made only with leave of court. If the action has been set for trial, a motion for summary judgment may be made only with the consent of all parties.

(B) For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof. However, if the action has been set for pretrial, a motion for summary judgment may be made only with leave of court. If the action has been set for trial, a motion for summary judgment may be made only with the consent of all parties.

(C) Motion and proceedings thereon. The motion shall be served at least fourteen days before the time fixed for hearing. The adverse party prior to the day of hearing may serve and file opposing affidavits. Summary judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(D) Case not fully adjudicated upon motion. If on motion under this rule summary judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court in deciding the motion, shall examine the evidence or stipulation properly before it, and shall if practicable, ascertain what material facts exist without controversy and what material facts are actually and in good faith controverted. The court shall thereupon make an order on its journal specifying the facts that are without controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(F) When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion for

summary judgment that he cannot for sufficient reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just.

(G) Affidavits made in bad faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

The Times Reporter

Opinion

Editorials
Analysis
Columns
Letters

Dover-New Philadelphia, O. Founded July 12, 1903

Harry R. Horvitz, Publisher
Harry Yockey, Editor

Jack D. Shores, General Manager
James E. Davis, Managing Editor

Page A-4 Wednesday, April 9, 1975

Prosecutor's office remiss

The Tuscarawas County prosecutor's reaction to the seizure of a stolen stereo set and several other items at a New Philadelphia apartment by Jerry Dupler, Dover councilman and a private eye, is somewhat surprising.

Prosecutor Ron Collins indicated there would not be any prosecution because of "a lack of criminal intent."

Private investigators, under Ohio law, must inform authorities 12 hours in advance of participation in a case. The prosecutor revealed he had been contacted about a search warrant the night Dupler, acting in behalf of Brad Dinolfo, made the seizure. However, the prosecutor said he didn't think police had "sufficient justification" for a warrant.

The prosecutor's office, we are certain, prosecutes numerous cases wherein "criminal intent" is not evident. J. C. Shew, an assistant prosecutor, added that their office isn't concerned that Dupler, employed by Cloverleaf Security, had not informed police of his intentions. Nor is the prosecutor's office concerned over the fact that Dupler did not have a search warrant.

It seems to us that Dupler, if he is qualified as a licensed private investigator, ignored Ohio law twice—by not giving authorities the proper notification and then by making a seizure without a search warrant.

It is proper to ask, in view of the circumstances, what the intent was behind Dupler's actions. It also is proper to ask if the prosecutor's office is politically motivated in its unconcern.

If Jerry Dupler is going to continue his work as a private eye the prosecutor's office should at least make certain he refrains in the future from ignoring Ohio statutes.

A7

LAW OFFICES
SANI AND BARNHOUSE
Warm Building - Public Square
New Philadelphia, Ohio 44663
Area Code 216
364-5538

Joseph F. Sani
James R. Barnhouse

August 6th, 1975.

The Editorial Department,
Times Reporter,
629 Wabash Ave.,
New Phila., Ohio.

In re: Jerry Dupler matter.

Dear Sirs:

I am enclosing a statement and article that has been prepared for and on behalf of Mr. Jerry Dupler. As his representative I am sending this to you at his request, in accordance with the statutes of the State of Ohio.

So that your department will know the particular statutes referred to, I am enclosing a copy for your consideration. They are Section 2739.13, Section 2739.14, Section 2739.15, and Section 2739.16 of the Revised Code of the State of Ohio.

Demand is being made for the publication of the verified enclosed statement and article in accordance with these statutes.

Very truly yours,

SANI & BARNHOUSE LAW OFFICES,
By /s/ James R. Barnhouse
James R. Barnhouse.

JRB:er
encls.

EDITORIAL RETRACTION

This paper on April 9th, 1975 was incorrect in an editorial which was titled "PROSECUTOR'S OFFICE REMISS". At the time the article was printed, this paper was in error that Jerry Dupler, while acting in his capacity as a private investigator, had not complied with the Ohio law in connection with giving the authorities proper notification of his activities.

Private Investigator Jerry Dupler is wellknown and was wellknown by the Dover Police Department and the New Philadelphia Police Department at the times referred to in the newspaper articles that preceded the editorial comment and said authorities had in fact been contacted in accordance with the statute then in effect.

This paper in said editorial implied that Jerry Dupler was not qualified as a licensed private investigator and this in fact was not true. This paper in its editorial also stated that Dupler ignored Ohio law twice - by not giving authorities the proper notification and then by making a seizure without a search warrant. This also was in fact untrue because the New Philadelphia Police Department was contacted before Mr. Dupler took any action. He also was not required to obtain a search warrant before he recovered any property that belonged to his client.

Investigator Dupler did in fact make it possible for the New Philadelphia Police Department to seize property under a seizure by a consent search which was in writing and given to the Police Department. A search warrant is a written instrument that is used by law enforcement officers in seizing property for the purpose of using the same as evidence in a criminal prosecution and would have no relationship whatsoever to a private individual obtaining such property for a different purpose.

In the instance referred to in said editorial and in other incidents since that time, Jerry Dupler, in his work as a private investigator, has aided and assisted individuals in recovering stolen property.

STATE OF OHIO,
TUSCARAWAS COUNTY, SS:

AFFIDAVIT.

I, Jerry Dupler, being first duly sworn on my oath, state that the facts as set forth in the foregoing article are true.

/s/ Jerry Dupler
Jerry Dupler

Sworn to before me and subscribed in my presence this 6th day of August, 1975.

/s/ Enid Randles
NOTARY PUBLIC.

Editorial is rebutted

(Editor's Note: The following was submitted by Jerry Dupler, Dover city councilman and an employe of Cloverleaf Security.)

The Times-Reporter on April 9, 1975, was incorrect in an editorial which was titled "Prosecutor's office remiss." At the time the article was printed, the paper was in error that Jerry Dupler, while acting in his capacity as a private investigator, had not complied with the Ohio law in connection with giving the authorities proper notification of his activities.

Private Investigator Jerry Dupler is well known and was well known by the Dover police department and the New Philadelphia police department at the times referred to in the newspaper articles that preceded the editorial comment and said authorities had in fact been contacted in accordance with the statute then in effect.

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Investigator Dupler did in fact make it possible for the New Philadelphia police department to seize property under a seizure by a consent search which was in writing and given to the police department. A search warrant is a written instrument that is used by law enforcement officers in seizing property for the purpose of using the same as evidence in a criminal prosecution and would have no relationship whatsoever to a private individual obtaining such property for a different purpose.

In the instance referred to in said editorial and in other incidents since that time, Jerry Dupler, in his work as a private investigator, has aided and assisted individuals in recovering stolen property.

Jerry Dupler
110 W. Slingluff av.
Dover

EXCERPTS FROM DEPOSITION OF DUPLER

Excerpts from testimony of Petitioner Dupler upon deposition submitted in support of Motion for Summary Judgment, beginning at page 11 (Emphasis and brackets ours):

By Mr. Hanhart:

[11] Q. Jerry, you have alleged in your Complaint that the Defendant, with actual malice, published the Editorial of April 9, 1975, is that correct?

A. That's correct.

Q. Now, what facts do you have to support the allegations of actual malice?

A. The newspaper, knowingly and intentionally, with knowledge of the truth, printed falsities in its Editorial by mis-quoting Sections of the Ohio Revised Code, and I consider this a direct insinuation and a direct charge of criminal conduct by the Editorial.

Q. Now, from what circumstances or what facts do you determine that they did this with malice?

A. As I just stated, with knowledge that it was a falsity they printed it.

Q. Now, do you know who at the newspaper had knowledge that the facts that they had printed were untrue.

A. Evidently the Editor or whoever wrote the Editorial, *I don't know personally.*

Q. Now, are you saying that the person who wrote the Editorial had knowledge other than what was in the Editorial?

[12] A. *I have no way of knowing* because I don't know who wrote the Editorial at this point.

Q. So, of your own personal knowledge you don't know that anyone at the newspaper had any knowledge other than that which was printed?

A. Anyone at the newspaper?

Q. Yes?

A. *No, I agree with that.*

Q. All right, who at the newspaper knew the facts to be different than what was printed?

A. I would say the editorial staff.

Q. Now, who on the editorial staff?

A. That would include the editor and those people who worked under him.

Q. Now, do you have any facts which prove that they had knowledge different than what was printed or is it your assumption that they knew?

A. *The law, it directly conflicts with what they printed, so I have to say that would be in a direct conflict with the law itself. I would have to say that this is my reason* for stating it was done with malice.

Q. You don't know specifically of anyone who had this knowledge that you complain of?

A. *No.*

Q. You're assuming someone had knowledge, is that right?

[13] A. *That's correct,* someone had to have knowledge.

Q. Now, you have alleged that they intended to injure and defame you and your character and reputation; what facts do you have which would indicate that they intended to injure?

A. In my petition, I think the Editorial itself is explanatory in that nature, referring to the Editorial as a whole.

Q. Now, are you alleging that they were out to get you, is that what you're saying?

A. I think it's rather evident.

Q. *So, that is your opinion?*

A. *Yes.*

Q. Who was out to get you?

A. I would say, only going by the title, the Times Reporter, people at the Times Reporter.

Q. Had the Times Reporter ever supported you?

A. Had they ever supported me?

Q. Yes, in your capacity as councilman, for Mayor, this type of thing?

A. As a councilman, yes.

Q. They did support you?

A. Yes.

* * * * *

[17] Q. I believe you indicated, Jerry, that you felt that the Defendant was aware, was fully aware of the facts of the incident prior to the publication of April 9, 1975, is that correct?

A. That's correct.

Q. Are you aware that in your Complaint you have indicated that the acts and conduct of the Defendant amounted to recklessness when the defamatory potential of the Editorial was apparent in publishing the same *without* full knowledge of the truthfulness of all of the facts, are you aware that you have alleged that they did *not* have knowledge of the truthfulness?

A. *That's correct.*

Q. *Is your allegation in your Complaint correct?*

A. *It is correct.*

* * * * *

[18] Q. And you know of no specific facts that would substantiate your claim of actual malice?

A. *I know of no specific.*

Q. Specific facts that would substantiate your claim of actual malice?

A. I say that knowledge of the truth and the failure to print the truth is a fact.

Q. But you have alleged that they did not have knowledge of the truth; do you feel now that they had knowledge of the truth?

[19] A. Basically I'm afraid I'm going to have to take exception to the question on the basis that you can know part of the truth and not all of the truth.

Q. Are you alleging that they knew part of the truth and not all of the truth?

A. I'm only saying it it's possible that a person can have only—I'm saying that they did have basic or most or all of the knowledge.

* * * * *

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

The following excerpts from the transcript is the testimony of Editor Yockey both on Cross-examination and on Direct examination, relating to the circumstances surrounding his writing and publishing of the editorial (Exhibit A - Appendix A). Cross-examination begins at page 95 of the transcript and is conducted by Attorney Tripodi:

By Mr. Tripodi:

[95] (Q) Mr. Yockey, on or about April 9, do you recall writing an editorial on that date?

(A) Yes.

(Q) Mr. Yockey, I'm going to hand you what has been marked as Plaintiff's Exhibit "A" and I'll ask you to look that over, please?

Do you know what that is?

(A) It's the editorial page.

(Q) What page is it and from what newspaper?

(A) Page A-4.

(Q) Who published that article?

(A) Times Reporter.

(Q) Who wrote that article?

(A) I did.

(Q) Where did that particular editorial appear? I think you mentioned Page A-4. What portion of the page did it appear?

[96] (A) Left side.

(Q) Now, what you're holding is the page in question, that's marked Exhibit "A". Is that correct?

(A) Yes.

(Q) That's not the whole newspaper?

(A) No.

(Q) Just a portion of it?

(A) Yes.

(Q) And is that the top lead editorial of April 9, 1975?

(A) Yes.

(Q) Now, what is the editorial? "Prosecutor's Office Remiss",—is that the thing you wrote?

(A) That's the headline.

(Q) Did you prepare the headline?

(A) Yes.

(Q) Did you also prepare the writings thereunder?

(A) I wrote it. Yes.

(Q) Now, where did you get the information upon which that editorial and the facts contained therein were based?

(A) Based on the story that ran previously.

(Q) Were there more than one story?

(A) There were two.

[97] (Q) All right. Do you recall those stories without seeing them at all? Do you recall the stories without having them before you?

(A) I can't recall them word for word. I can give you a general idea of what they were.

(Q) Was there any other sources of information that you looked at prior to the writing of the article on April 9, 1975?

(A) No.

(Q) Now, did you at any time yourself, talk to the Prosecuting Attorney's office prior to April 9, 1975?

(A) No.

(Q) Did you talk to Jerry Dupler at any time prior to April 9, 1975?

(A) No.

(Q) Did you know prior to April 9, 1975, who Jerry Dupler was?

(A) Yes.

(Q) Did your newspaper have in its possession, prior to April 9, 1975, a biographical file on Jerry Dupler,—if you know?

(A) I'd have to answer that "yes".

(Q) Now, in that file—(strike the question.) What is a biographical file,—for the Jury's benefit?

* * * * *

[98] (Q) Now, in this particular editorial, marked Exhibit "A", did your editorial state, in fact, quoting, that "Private investigators, under Ohio law, must inform authorities 12 hours in advance of participation in a case."?

(A) Yes.

(Emphasis and brackets ours)

(Q) Now, did you, in fact, [prior to that article,] know that Mr. Dupler had, in fact, notified the Police Department of New Philadelphia relative to the participation in that case?

[99] (A) *All I know is what was in the previous*—in *the initial story.*

(Q) Did anybody who worked for The Times Reporter check with the Police Department to get that information,—if you know?

(A) Yes, that's the only way they would have gotten it.

(Q) And in preparing or writing that article, did you put in that editorial that you didn't know the facts that you were writing about?

(A) No.

(Q) In other words, in this article, you didn't put down, "The Editor does not know, or have the facts of which I am writing."?

(A) No.

(Q) Is that a standard practice of the Editorial Staff, not to get the facts before they print them?

(A) I'm not sure what you're asking, but most editorials are written in this vein,—are based on news stories.

(Emphasis ours)

(Q) *So, again, the answer, I guess you are giving me is, you wrote this from previous stories?*

(A) *On the basis of a news story,—yes.*

(Q) Now, these previous news stories that you mentioned, for the purposes of identification, marked "F" and "G"—(Mark these, please)

(Plaintiff's Exhibits "E", "F" & "G" were marked for identification)

[100] (Q) Mr. Yockey, for the purposes of the record and to help you refresh your memory, I'm going to hand you at this time, Plaintiff's Exhibit "G" I'll have you look at that one first.

(A) Okay.

(Q) Do you know what you are holding in your hand?

(A) Yes.

(Q) What is it?

(A) This is the original story.

(Q) What date did it appear and what newspaper?

(A) It appeared on Friday April 4, 1975 on page 3.

(Q) And Plaintiff's Exhibit "F"? What is that you are holding in your hand?

(A) This one appeared on Tuesday April 8, 1975 on page 3.

(Q) Whose newspaper was that printed in?

(A) Times Reporter.

(Q) Now, in that article on April 9, 1975, you have stated that you printed that the law says that he had to inform authorities twelve hours in advance of coming into the city. Is that correct?

(A) Yes,—repeat the question, please.

(Q) On the article of April 3, Plaintiff's Exhibit "A", you state in that article that under the **[101]** law, he had to notify authorities twelve hours in advance of coming into the city?

(A) Yes.

(Q) Is that correct?

(A) Yes.

(Q) Now, did, in fact, that law state that?

(Emphasis ours)

(A) *That I can't tell you. All I know is what it says here in the story,*—what Chief Locker said.

(Q) Now, I'm going to hand you what's been marked as Plaintiff's Exhibit "E".

I'll ask you to examine Plaintiff's Exhibit "E" if you would, Mr. Yockey, and I'll ask you if you can identify what you are holding?

(A) A section of the Ohio Code.

(Q) Does that section 4749.05, section A & B, appear on Exhibit "E"?

Mr. Hanhart: Objection.

The Court: Let him answer. Overruled.

Mr. Yockey: Repeat the question, please?

(Thereupon, question was read by reporter)

Mr. Hanhart: Objection again.

[102] The Court: Overruled.

(A) Yes.

By Mr. Tripodi:

(Q) Now Mr. Yockey, that section of the law,—when you printed that article, you stated that he had to notify the police chief twelve hours in advance. Is that correct?

(A) Yes.

(Q) The section of law says "within—

Mr. Hanhart: Objection, Your Honor.

The Court: Overruled.

By Mr. Tripodi:

(Q) "within twelve hours of coming into the community." Is that correct? Look at the section, please. Sec. B.

Mr. Hanhart: Objection.

The Court: Overruled.

(A) Yes, it says "within twelve hours of their arrival."

[103] (Q) What you printed in the article of April 9, 1975, and referring to that Ohio Statute and what the law is, is the statement of April 9, 1975, true or false?

Mr. Hanhart: Objection.

The Court: He may answer.

(Q) Is the article true or false? That statement is "in advance—12 hours in advance", as opposed to what the law is—

(A) As opposed to the law, it would be false.

Mr. Hanhart: Objection. Move to strike the answer.

The Court: Overruled.

By Mr. Tripodi:

(Q) Now, in your editorial on Exhibit "A" again, Mr. Yockey, I want to keep referring back to that. I don't want to keep too much here on your desk,—but on the left-hand side of that article, beginning on the paragraph on the upper right- **[104]** hand side, did your editorial state that Mr. Dupler had not informed the police of his intentions?

(A) On the right-hand side,—yes.

(Q) It says: "It seems to us that Dupler, if he is qualified as a licensed private investigator, ignored Ohio law twice—by not giving authorities the proper notification and then by making a seizure without a search warrant."

(A) Where did you read that from?

(Q) Right here,—and above that, did you print that he "had not informed police of his intentions."? It says: "J. C. Shew, an assistance prosecutor, added that their office isn't concerned that Dupler, employed by Cloverleaf Security, had not informed police of his intentions."

Now, in the next following paragraph, I think you quote: "It seems to us that Dupler, if he is qualified as a licensed private investigator ignored Ohio law twice"—(there is a dash)—"by not giving authorities the proper notification and then by making a seizure without a search warrant."

Now,—in that, what law were you talking about?

(A) I'm quoting from the story here, which says: "According to police, Dupler, a Dover mayoral candidate, violated a section of the Ohio Revised [105] Code which states a private investigator must give a sheriff and police chief 12 hcurs advance notice of his involvement in a case."

(Q) Now, in accordance to what you just read,—you read from where?

(A) Plaintiff's Exhibit "G". The original story.

(Q) That was printed on what date, Sir?

(A) That was April 4.

(Q) And in the April 4 and April 8 articles, were you informed, or did these articles state that, in fact, no Ohio law was violated?

(A) According to the police, he violated a section of the Ohio Revised Code,—according to the Police Chief, who made that comment.

(Q) Do you know who wrote that story?

(A) I think that story was written by Tom Simmelink, I believe.

(Q) All right. Now, in those two articles, Exhibits "G" and "F", was the newspaper informed by the Prosecuting Attorney that Dupler had violated no law?

Mr. Hanhart: Objection.

The Court: (Addressing court reporter) Read the question.

[106] (Thereupon, question was read to Court)

The Court: Overruled.

(A) That, I don't know.

(Q) I'd like you to look at Exhibit "F". The next to last paragraph, where it quotes J. C. Shew, I believe, "Dupler in no way obstructed the administration of justice."

Do you find that?

(A) Yes.

(Q) Did you find that—where it said there was no obstruction of justice?

(A) Right.

(Q) Now, when you wrote that editorial, did you pick that up in that editorial or in that article and put it in the newspaper in the editorial,—that there was no obstruction of justice?

(A) No, I did not.

(Q) You put it down that he violated the law twice. Is that correct?

(A) On the basis of the previous story,—yes.

(Q) Now, from the article you hold in your hand, Exhibit "F", and the comment therein, and what you printed on April 9, 1975, is what you printed [107] on April 9, 1975 true or false?

(A) Will you repeat the question?

(Thereupon, question was read to witness)

(A) I would say it's false.

(Q) And further, in the April 9, 1975 editorial, you stated in so many words, that he searched without a warrant?

(A) Yes.

(Q) And in the article you hold in your hand, that was before you when you wrote the April 9 article, that said that there was no obstructions of law—

Mr. Hanhart: I'm going to object, Your Honor.

Mr. Barnhouse: This is cross examination.

The Court: Overruled.

By Mr. Tripodi:

(Q) —that said he in no way obstructed justice. Is that correct?

(A) That's what it says.

(Q) Now, when you put the statement in the April 9, 1975, editorial, that he had to have a search [108] warrant or he violated a law about a search warrant, were you taking it from the previous article?

(A) Yes. I did take it from the previous article. I think it was taken from there.

(Q) That he in no way obstructed justice? You took it from the article?

Mr. Hanhart: Objection, Your Honor. There are two questions there.

The Court: Objection sustained.

By Mr. Tripodi:

(Q) Mr. Yockey, when the April 8, 1975 article stated that he in no way obstructed justice, did you read that?

(A) Yes.

(Q) Then on April 9, 1975, you said in your editorial that he violated two sections of Ohio law. Correct?

(A) Yes.

(Q) One being the 12 hour notification statute?

(A) Yes.

(Q) And the other one being search without a search warrant?

(A) He did not have a search warrant?

[109] (Q) Now, from the article on April 8 to the article of April 9, was what you printed on April 9 a true or false statement?

(A) I'd have to say it was false.

(Q) Now, Mr. Yockey, do you know of your own knowledge, what the penalty is, the criminal penalty is, for violation of 4749.05 (A)?

(A) No.

(Q) You have not been told that it carries a prison sentence?

Mr. Hanhart: Object, Your Honor.

The Court: You may answer the question.

Mr. Hanhart: Does that relate to the time he wrote the article or since, Your Honor?

The Court: I'm going to let him answer.

(A) No.

(Q) You don't know the penalty? Did you attempt to find out what the penalty was?

(A) No.

(Q) Did you care what the penalty was?

[110] (A) Well, I didn't know I violated a law.

(Q) You didn't know?

(A) No.

(Q) You shoot the gun. You don't know where the bullet aims,—hits?

(A) I wasn't shooting a gun.

(Q) You weren't?

(A) No.

(Q) Now, in the April 9, 1975 editorial, again, I believe you stated in that article,—and I'll attempt to quote from it, from the second full paragraph on the right hand column,—quoting: "It seems to us that Dupler, if he is qualified as a licensed private investigator—", —did you print that?

(A) Yes.

(Q) Did you write that?

(A) Yes.

(Q) Now, in your prior articles, in the articles,—did it not, in fact, state that Dupler, in Plaintiff's Exhibit "F", did it not state, quoting, on the third paragraph, second column of Plaintiff's Exhibit "F", that "Dupler is a licensed private investigator?"

(A) Yes.

[111] (Q) Now, when you printed your April 9, 1975 article, was that statement, "if he is qualified", a true or false statement?

(A) I'm asking a question,—if he is a qualified private investigator.

(Q) You knew he was from the articles printed before?

(A) That's what the article says,—yes.

(Q) Are you now questioning the articles that were printed prior?

(A) I'm not questioning—I'm just saying,—if he is.

(Q) Pardon me?

(A) I'm just saying, "if he is a qualified private investigator".

(Q) You didn't take the wording from the Editorial Staff in Plaintiff's Exhibit "F" then?

(A) I could have said, "as a private investigator—

(Q) The question is,—did you take the wording from the prior articles?

(A) No.

(Q) So what, in fact, you did then, Mr. Yockey, was totally disregard whatever the truth was and printed what you wanted to print?

(A) I would have to say yes.

Direct examination of Editor Yockey regarding the circumstances surrounding the writing of the editorial, pertinent to the issue of his "knowledge" or "state of mind" at the time of publication, Direct examination by Attorney Hanhart, at page 393:

By Mr. Hanhart:

[393] (Q) Having read the article of April 4, Harry, written by Tom Simmelink, which is Exhibit "G", I'll ask you whether or not you formed a belief

as to whether the facts in that article were true or false?

[394] (A) Yes.

(Q) All right, Sir. What was that belief?

(A) That they were true.

(Q) What was the basis for your belief?

(A) Well, Simmelink is a qualified reporter,—qualified writer.

(Q) Now Harry, I'll ask you, having read the article of April 8, written by Joe Mizer, which is Exhibit "G",—Exhibit "F" prior to your writing the editorial of April 9, I'll ask you whether or not you formed a belief as to whether the facts in that article were true or false?

(A) Yes.

(Q) And I'll ask you what that belief was?

(A) That the facts were true.

(Q) And did you have a basis for that belief?

(A) The same basis as I had for this one. This one was written by Joe Mizer, a very trustworthy, qualified reporter.

(Q) All right, Sir. Now Harry, having written your article of April 9, 1975, your editorial of April 9, 1975 which is Exhibit "A" and having sent that to the composing room, I'll ask you whether or not at the time you wrote it, and published it, whether you had a belief as to whether the facts in that editorial were true or false?

(A) That they were true.

[395] (Q) You had a belief. Is that correct?

(A) Yes.

(Q) What was the belief?

(A) That the facts were as they were stated in the two articles.

(Q) And did you believe that you had correctly quoted those facts in the editorial of April 9? Your Honor, I'll re-phrase the question.

The Court: If you chose, you may ask the question again.

(Q) Fine. Having prepared your editorial of April 9 and written it and sent it to the composing room for publishing, I'll ask you whether or not you had a belief at that time, as to whether the facts in that editorial were true or false?

(A) Yes.

(Q) What was that belief?

(A) That they were true.

Mr. Hanhart: No further questions.